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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. E052 OF 2023

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 19, 20, 21, 22, 23, 24, 27, 28, 29, 33, 36, 41, 43, 47, 50, 54, 55, 159, 165, 258, 259, AND 260 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF RULE 7(1) OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016

IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 2, 3, 5, 9, 10, 11, 12, 13, 14, 15, 17 20, 21, 30, 34, 35, 36, 40, 41, 43, 44, 45, AND 49 OF THE EMPLOYMENT ACT

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE ILO TERMINATION OF EMPLOYMENT CONVENTION,

1982 AND RECOMMENDATION 166 THEREOF;

TERMINATION OF EMPLOYMENT RECOMMENDATION, 1982 (NO. 166)

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 3 AND 4 OF THE FAIR ADMINISTRATIVE ACTION ACT

IN THE MATTER OF ALLEGED CONTRAVENTION OF GUIDING PRINCIPLES 11, 12, 13, 14, 17, 18, 19, 22, 23, 29, AND 31 OF THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS IMPLEMENTING THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY FRAMEWORK'

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR

PUNISHMENT

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE MIGRATION FOR EMPLOYMENT CONVENTION (REVISED), 1949 AND THE MIGRANT WORKERS (SUPPLEMENTARY PROVISIONS) CONVENTION, 1975

-BETWEEN-

KIANA MONIQUE ARENDSE ..... 1ST PETITIONER

JAMES AGADA MARK.....2ND PETITIONER

MEAZA SHURA .....3RD PETITIONER

MARK AGABA.....4TH PETITIONER

FASICA BERHANE GEBREKIDAN.....5TH PETITIONER

CAMERON ROWAN CORNER.....6TH PETITIONER

ROBEL KHASAY GEBRU.....7TH PETITIONER

ABEL ABRHA ASGEDOM.....8TH PETITIONER

EPHREM KIRUBEL MIHRETEAB.....9TH PETITIONER

DAWIT BIRHANE BERHE .....10TH PETITIONER

TREVIN BROWNIE.....11TH PETITIONER

LUBEGA EDWARD .....12TH PETITIONER

NAOD AMANUEL GEBREKIDAN .....13TH PETITIONER

TEAMIR DELLELEGN.....14TH PETITIONER

KAUNA IBRAHIM MALGWI.....15TH PETITIONER

TSIDENA ABADI ZEMO .....16TH PETITIONER

MESERET DINKU ABDO .....17TH PETITIONER

AYANA EPHREM GELETA .....18TH PETITIONER

ALEWIYA MOHAMMED MUSA .....19TH PETITIONER

TIKKY OLANG'O.....20TH PETITIONER

KHOTHAMANI MHLONGO..... 21ST PETITIONER

YONA BEDASA .....22ND PETITIONER

THRAS GIDEY .....23RD PETITIONER

SAMRAWIT TEKESTE .....24TH PETITIONER

ZEGEYE DAWIT GEBREMARIAM .....25TH PETITIONER

JASON ILOVU.....26TH PETITIONER

ROSEBELLAH WAKHU .....27TH PETITIONER

CAROLINE NJERI MUCHANGI .....28TH PETITIONER

EVELYNNALUWU .....29TH PETITIONER

HASSAN ALKANO .....30TH PETITIONER

EDINAH LUMUMBA ..... 31ST PETITIONER

PALESA GLORIA KOMETSI.....32ND PETITIONER

MAHAT ABDULLAHI SHEIKH .....33RD PETITIONER

MAHLET YILMA .....34TH PETITIONER

CIELLA IRAMBONA.....35TH PETITIONER

MUSA ABUBAKAR .....36TH PETITIONER

ABDIKADIR GUYO.....37TH PETITIONER

JAMES IRUNGU .....38TH PETITIONER

HABEN HAILE YOHANES.....39TH PETITIONER

JUANITA JONES .....40TH PETITIONER

ODIRILE MOLEBOGE..... 41ST PETITIONER

TESSLINE TONI KIEWIETS.....42ND PETITIONER

ANTIAN JAY-DEAN MOOSA .....43RD PETITIONER

-VERSUS-

META PLATFORMS, INC ..... 1ST RESPONDENT

META PLATFORMS IRELAND LIMITED ..... 2ND RESPONDENT

SAMASOURCE KENYA EPZ LIMITED

T/A SAMA..... 3RD RESPONDENT

MAJOREL KENYA LIMITED..... 4TH RESPONDENT

-AND-

KENYA HUMAN RIGHTS

COMMISSION.....1ST INTERESTED PARTY

KATIBA INSTITUTE .....2ND INTERESTED PARTY

KITUO CHA SHERIA .....3RD INTERESTED PARTY

KENYA NATIONAL HUMAN RIGHTS AND

EQUALITY COMMISSION .....4TH INTERESTED PARTY

CENTRAL ORGANISATION OF

TRADE UNIONS .....5TH INTERESTED PARTY

THE ATTORNEY GENERAL.....6TH INTERESTED PARTY

MINISTRY OF LABOUR, SOCIAL SECURITY

AND SERVICES .....7TH INTERESTED PARTY

MINISTRY OF HEALTH.....8TH INTERESTED PARTY

MINISTRY OF FOREIGN AFFAIRS....9TH INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 2nd June, 2023)

RULING

1. The petitioners filed an application by way of the notice of motion dated 17.03.2023 through Nzili and Sumbi Advocates and learned Counsel Mercy Mutemi Advocate appeared in that behalf together with learned Counsel Ms. Joyce Gathoni. The application was under Articles 22, 23, 48, 50, and 159(2) (d) of the Constitution of Kenya, 2010 and Rules 3, 19, 23, and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; section 3(1), 3(2) & 12 of the Employment and Labour Relations Court Act and Rules 17 and 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016; section 1A AND 1B of the Civil Procedure Act and Order 5 Rule 21, 22, 22A, 22B, 25 and 26 of the Civil Procedure Act.
2. The petitioners (applicants) prayed for orders:
    a) …. (spent).
    b) …. (spent).
    c) …. (spent).
    d) That pending the hearing and determination of the petition, the Honourable Court be pleased to issue an interim injunction

order restraining the 1st, 2nd and 3rd respondents from implementing in any manner whatsoever anything incidental to or related to the redundancy notice issued to Facebook Content Moderators (GPL 8 CO) ON 10.01.2023 as read together with the redundancy notice issued on 18.01.2023; in particular, and for greater certainty, the 1st, 2nd and 3rd respondents be restrained from terminating the contracts of the Facebook Content Moderators pending the hearing of the petition.

e) .... (spent).

f) That pending the hearing and determination of the petition, the Honourable Court be pleased to issue an interim injunction order restraining the 1st, 2nd, and 3rd respondents from varying the contractual terms of the Facebook Content Moderators (GPL 8 CO) in a manner unfavourable to the moderators.

g) .... (spent).

h) That pending the hearing and determination of the petition, the Honourable Court be pleased to issue an interim order that any

contracts that were to lapse before the determination of the petition be extended such that the termination date will be after the determination of the petition.

i) .... (spent).

j) That pending the hearing and determination of the petition, the Honourable Court be pleased to issue an interim injunction order restraining the 1st and 2nd respondents from engaging content moderators to serve the Eastern and Southern African region through the 4th respondent or through any other agent, partner or representative or in any manner whatsoever engaging moderators to do the work currently being done by the moderators engaged through the 3rd respondent.

k) .... (spent).

l) That pending the hearing and determination of the petition, the Honourable Court be pleased to issue a prohibitory order restraining the 1st, 2nd and 4th respondents from refusing to recruit qualified content moderators on grounds that they were previously engaged through the 3rd respondent.

m)…. (spent).

n) That pending the hearing and determination of the petition, the Honourable Court be pleased to issue a prohibitory order restraining the respondents either by themselves, their servants, agents, employees, or anyone acting under their authority, direction, control, or instruction from, whether by words or actions, making any threat to or in any way whatsoever retaliating against any moderators as a result of the institution of the petition.

o) …. (spent).

p) That pending the hearing and determination of the petition, the Honourable Court be pleased to issue an order to compel the 1st, 2nd and 3rd respondents to provide proper medical, psychiatric and psychological care for the petitioners and other Facebook Content Moderators in place of 'wellness counselling'.

q) …. (spent).

r) That pending the hearing and determination of the petition, the

Honourable Court be pleased to issue an order to the 1st, 2nd, and 3rd respondents to regularize the immigration status for all Facebook Content Moderators who are immigrants and all costs protect them from deportation.

s) That costs of the application be provided for.

3. The applications were based upon the annexed supporting affidavits of Kiana Monique Arendse, Fasica Berhane Gebrekidan and Mahlet Yilma. It was urged for the applicants as follows:

a) The applicants are Facebook Content Moderators engaged through the 3rd respondent to work for the 1st and 2nd respondents.

b) The 1st and 2nd respondents have their principal offices at 1601 Willow Road, Menlo Park, California 94025 and 4 Grand Canal Square Grand Canal Harbour Dublin, Ireland, respectively.

c) The 1st, 2nd and 3rd respondents are in the process of terminating the contracts of the petitioners and all other content moderators engaged through the 3rd respondent and

through an unlawful redundancy.

d) The petitioners and all the other content moderators have been issued with termination letters indicating that their employment contract will be terminated effective 31.03.2023 on account of redundancy. 260 content moderators are set to lose their jobs on the said date.

e) The redundancy being undertaken is unlawful because no genuine nor justifiable reason was given for the redundancy. The moderators have been given varying and confusing explanations for the redundancy and which does not add up.

f) The redundancy is unlawful for failure to comply with the provisions of the Employment Act. No proper redundancy notice was issued. The notices issued on 10.01.2023 and 18.01.2023 were essentially termination letters. The 30-days' statutory notice was not served upon the applicants. They were not consulted at all. The criteria used to terminate them did not take into account the statutory provisions such as seniority in time, skill, ability and reliability of individual moderators. The

terminal dues have not been computed and communicated to each or any of them. The payment of the moderators' dues is being made conditional to upon their signing of non-disparagement documents for which no consideration has been offered.

g) The 1st and 2nd respondents have proceeded to engage the 4th respondent to recruit new content moderators to replace the moderators engaged through the 3rd respondent.

h) The 1st and 2nd respondent have instructed the 4th respondent not to recruit any of the moderators currently engaged through the 3rd respondent amounting to discrimination and unfairly targets the petitioners and the other moderators.

i) The applicants and other moderators engaged through the 3rd respondent have tried to obtain alternative employment as content moderators with the 4th respondent but have been denied despite them being qualified for the job. They have received communication that their applications have been denied on the basis that they previously worked at the 3rd

respondent's facility.

j) Most of the applicants are foreigners. Their permits to be in Kenya are predicated on their employment and termination of the employment makes it impossible for them to prosecute the present petition because of complexity of the case. Further they were recruited from humble backgrounds and are breadwinners in their families. Losing of their jobs in such unlawful manner will cause them untold suffering.

k) Some of the applicants are refugees fleeing from their war torn countries. They relied on the 3rd respondent to regularise their immigration records which expired out of no fault of such applicants and due to 3rd respondent's negligence. They are now vulnerable to deportation whilst the 3rd respondent has refused to act to guarantee their safety.

l) The applicants who are Ethiopian refugees face a further risk to their lives as they have been marked as targets back home. That is because they have been moderating Facebook content during the on-going civil conflict. They have taken down

incite full and harmful posts by war loads and propagandists who now would like to revenge.

m) The work of a moderator is extremely toxic and dangerous. Most moderators have reported extensive harm to their mental health and psychological disorders which can be traced back to the job they have been doing for the 1st, 2nd, and 3rd respondents. The 1st, 2nd and 3rd respondents have exploited them and now want to dump them having ruined their lives.

n) The petition details the numerous ways in which the respondents have and continue to violate the moderators' constitutional rights.

o) The applicants have also sought protection orders as the respondents have a history of retaliating against moderators who stand up for themselves. The redundancy itself is a retaliation after a former moderator filed a petition against the 1st, 2nd, and 3rd respondents.

p) The respondents will not suffer any prejudice should the application be determined urgently.

4. The applicants' case is that at initial employment, each was simply given an offer letter and it was not disclosed that they would be moderating content for Facebook. The letter did not offer any detail as to what the actual job of content moderation was, its possible side effects, the physical, mental, and emotional aspects of the job or even who the content they would be moderating was for. At engagement a training took place at an office inside Naivas Head Office compound in Sameer Industrial Park, Nairobi. The training took place for three weeks about violation groups and Facebook policies. It is at the training that the applicants learned they would be moderating content for Facebook. Tests were administered in the 4th week and a week later, most of the applicants started production (officially auctioning tickets). The applicants further case is that the job was a dreadful experience draining them physically, mentally, and emotionally. Their personality and psyche has changed completely from ambitious, happy, spontaneous, friendly, outgoing, and generally sociable, to, bitter, avoidant, cynical, paranoid and persons with anti-social personality disorder due to reviewing

extremely graphic contents on a daily basis. The 5th applicant in her supporting affidavit states that she has worked as a content moderator for Meta since 2021 and she moderated content in Amharic on both Facebook and Instagram. Her account of her job experience is as follows:

56. That since the day I was assigned to review contents for the Tigrinya/ Amharic market, my daily routine at Sama Source was to watch graphic videos back-t0-back from the Ethio-Tigray war which broke out in November, 2021.

57. That majority of the content I review daily includes mutilated or dismembered bodies, sadistic videos depicting man slaughter and burning of persons alive among others.

58. That I remember my first experience witnessing manslaughter on a live video in which I unconsciously stood up and screamed.

59. That for a minute I almost forgot where I was and who I was. Everything went blank. Co-workers who saw my reaction reported it to the team leader on shift, after which I was told to go see a counsellor.

60. That sadly, the counsellor could not reverse what I saw, nor could he help me in any way. Most of the counsellors are not inviting to speak to and are helpless themselves to offer help to you other than just nodding and listening to you talk for 30 to 45 minutes.

61. That the wellness counsellors offered at Sama are not qualified psychiatrists nor psychologists yet they are supposed to help us process such complex trauma. It is as if Sama are laughing at us when they send us to those wellness counsellors.

62. That the medical insurance cover provided is barely enough to afford actual treatment for mental health damage. We therefore stuck in a loop of toxicity where we cannot get ourselves out and there is no one coming to save us.

63. That the day I first saw the first live video of a manslaughter happening, I had nightmares, and I could not sleep from the flashbacks of what I saw.

64. That to date I suffer from chronic migraine and insomnia. I just know my life will never be the same again.

65. That though I became desensitized to graphic contents, nudity

and self-harm as time goes by, I am still afraid that these dark experiences will scar me for life.

66. That all of the content we review is negative our job is essentially to remove negative content from the platform to protect the community from harm.

67. That while protecting the community we collect all this negative content 8 hour a day and five days a week.

68. That we collect this negative information subconsciously including insults and vulgar words of all types between users, threats, violent words, derogatory words in addition to the daily graphic and nude and sexual activity contents.

69. That having all this negativity and human cruelty saved in my head I could not function like other normal people.

70. That Sama and Meta have purportedly made life even much harder notwithstanding how difficult the job is already.

71. That for instance I was not allowed to discuss any details of my job with my family members at home and in any case I couldn't because they wouldn't understand what I was going through.

72. That we have signed a Non-Disclosure Agreement that we are not allowed to discuss our work with anyone. This solitude has made me rather avoidant and made it easier to be alone which is extremely dangerous when one's mental health is not intact.

73. That I cannot even discuss anything with other colleagues since the 3rd respondent has made the workplace toxic intentionally to divide workers to turn against each other.

81. That what Meta and Sama are doing to African youth is so heartless. It is as if we are being collected from all over Africa to be tortured in slave like conditions. We are building the world's largest social media platform Facebook and in turn Meta and Sama make sure we will never live normal lives again.

82. That all my colleagues display queer behaviour characteristic of a people who have been damaged. There is especially so much mistrust as everyone is afraid they will be reported to management and dealt with.

83. That there are those of us who are in dire need of psychiatric care and therapy and cannot afford it. We keep showing up to work

in order to get the monetary benefit from it so that we can at least find a way to survive.

84. That if there is any way that the Honourable Court can accord me access to urgent psychiatric and psychological care, I would be most grateful.

5. The applicants case is that there is no genuine reason for redundancy. The reason is that an employee sued Meta and Sama and applicants were warned not to talk about the working conditions. Further, the positions of content moderators cannot be redundant as such because the survival of social media platforms largely depends on the content moderators. The redundancy was calculated to get rid of the applicants. All the suffering by applicants, in their case, is attributable to Sama and Meta. The redundancy should therefore be stayed. They say the toxic content they have been exposed to violated their rights. The set performance metrics by Meta were inhumane and impractical and were a violation of human rights. Further case is that the toxic workplace created by Meta and Sama was a violation of the applicants' rights. The 5th

applicant stated at paragraph 127 of her affidavit thus, "127. That in general, I came to work as a moderator while whole and now I am losing my job a broken shell of myself not even able to adjust well to society and not certain of what my next steps are to. I am also unable to afford therapy which I am currently in dire need of."

6. The 34th applicant Mahlet Yilma Lemma states that in April 2019 while residing in Ethiopia she learned that Sama was recruiting for the job of an Amharic Speaking Call Center Agents to be located in Nairobi. The job description was provided and the organisation promised to process work permit, provide accommodation for one month, and air ticket. Salary was USD500+ Successful applicants were to be ready to move in 10 days. The 34th applicant applied for the job and was subjected to preselection interview and asked about her personality and some odd questions about her views on the LGBTQIA+ community and the types of things she found offensive on social media platforms. She did not understand that a Call Center Agent job required her to provide her opinion about the things she found offensive on social media but she decided to proceed as she

needed the job. She was offered the job at Samasource by letter of offer dated 23.04.2019. The letter stated that she had been offered the job of Content Moderator and she had no idea what the job was or what the job entailed. At the interview it was never disclosed that the job to be offered was for content moderation. She travelled to Nairobi, Kenya, on 27.04.2019 to take the offer. Upon arrival she underwent training at the 3rd respondent's offices. The training was prefaced by a Graphic Policy where the trainer explained about the content types and trained the recruits on the policies they were expected to rely on. It is at that point that she came to know that the work entailed dealing with on-line content. The training was for a month. It became clear that the 3rd respondent acts on behalf of the 1st and 2nd respondents, conveying its policies, beliefs, attitudes and business practices to the content moderators. It became clear to her that the work of a Facebook content moderator was controlled by the 1st and 2nd respondents. The control included the training materials, the system used for moderation known as the SRT workplace, the standards of work, the number of content moderators

to be engaged, their remuneration and the psychosocial support structures put in place for their healthcare. Each recruit was told that each would have an activity code to show whether they were actively auctioning or handling tickets or were away from their desks. For auctioning tickets, the instructions were that for videos they were expected to watch the first 15 seconds and the last 15 seconds of each video and determine whether the video went against the policies of the 1st and 2nd respondents. After making the determination based on the 30 seconds of viewing, she states that, they were to decide whether the content should remain up or be taken down. She further states that it was made clear that the average time for handling a ticket was 60 seconds and below per ticket as the average handling time (AHT). Any higher time than 60 minutes was considered poor performance. She states that the possible effect of the content they were handling was not discussed and the very real risk of their mental health being forever altered by the content they were about to encounter. She was required to action between 500-1000 pieces of content per day and which took a very heavy toll

on her physical and mental health as it was extremely draining. Further, she was subjected to TDMR training where the content sent to her was extremely random, vulgar, graphic and truly not content meant for human consumption. The aim of the TDMR training was to practice the policies without being evaluated by quality scores. Thereafter, she started the job, the actual content moderation and she has, in carrying out the job witnessed the vilest things humanly possible.

7. The 34th applicant further states in her supporting affidavit as follows. The workplace was incredibly toxic. From the start she felt Sama did not care about her, her wellbeing or what she had to say. She made requests but things had to be done their way. It included off days' arrangements, leave days, and literally everything. She felt voiceless and she felt the 3rd respondent treated her like garbage and exercised its power over her every chance they got. That the management had all the perks and all the power yet the content moderators who did the actual job were in a workplace where intimidation, fear and anxiety were routinely exercised and

weaponised. In the process her mental health had been detrimentally affected and changed her vas a person to the core. Thus, since August 2019, she has been suffering from insomnia due to the vast amount of vile content she had to endure and the erratic shift changes. On 08.10.2021 Dr. Pius Kigamwa, Consultant Psychiatrist saw her and diagnosed her with insomnia that is related to different sleeping hours related to the nature of her work. The doctor recommended, per exhibit MV4, that she be supported through being allowed to do day shift as she recuperates. She informed the 3rd respondent's management that being on night shift only served to exacerbate her insomnia but no substantial changes were made. On 29. 11. 2019 she informed her team leader Kennedy Lukilah that she was on sleeping peals and requested to work on day shift as opposed to night shift. She was put on day shift for only one week and returned to night shift the following week per exhibit MY5 being e-mail correspondence on the subject. She states that since 2019 she has been on sleeping pills and melatonin to try and adjust sleeping schedule. Further on 08.02.2022 she went for follow-up

treatment and she was given treatment for fatigue and insomnia. It is her case that her mental health is irreversibly damaged and she does not know if her sleep will ever come back to normal.

8. The 34th applicant states that like other of the petitioners she received an email on 09.01.2023 inviting her to a town hall meeting to be held on 10.01.2023. At the meeting the 3rd respondent communicated that Meta had refused to renew their contract and the 3rd respondent would not be carrying out content moderation work and would therefore be declared redundant and the last working day would be 28.02.2023. She thereafter received a redundancy notice from Annpeace Muthoni Alwala stating that Sama began content moderation in March 2019; Sama had decided to focus on its computer vision annotation technology platform and solutions and therefore discontinuing all work outside of the scope including content moderation; thus Sama would not be renewing their contract with Meta for Community Organisation work and Sama would therefore be declaring the content moderators' positions redundant. Sama further stated that it would notify the labour office and the

Federation of Kenya Employers; 30-days consultation and immigration support period and, release severance agreement. They would provide wellness support for the time period and 12 months after last working day. On 08.02.2023 from the said Annpeace Muthoni Alwala stating that the last working day would be on 31.03.2023; severance package and salary would be paid upto including 31.03.2023; severance pay would be fifteen days' salary for each year of service; one-month salary ex-gratia amount; annual leave earned but not taken; less any liabilities owed to the company; overtime, incentives and retention earned and not paid; and, one-way flight ticket to home base. Sama would facilitate one-year post-employment wellness support.

9. The applicants' case is that content moderation work continued to be available from the 1st and 2nd respondents and it was not genuine that the work ceased to be available. Further, the 1st and 2nd respondents will continue to need content moderators and if they are not engaged through the 3rd respondent then they are most definitely being engaged elsewhere. Further, timelines were so easily extended

and the applicants went on to carry out the content moderation wreaks of mischief on the part of the respondents. It is the applicants' case that the work of content moderation was still available at the offices of the 3rd respondent and the content to moderate is still being provided by the 1st and 2nd respondents but they had decided to unlawfully terminate all the applicants and call it redundancy to cover their tracks. That the applicants' case was that it appeared that due to the case filed by Daniel Motaung against the respondents herein, the 1st and 2nd respondents had decided to cut ties with the 3rd respondent and the applicants and other content moderators are collateral damage in the process. The 34th applicant stated in her supporting affidavit that she had applied to be employed by the 4th respondent but the 4th respondent declined to hire her. Further being a young woman she cannot continue staying in Kenya without due legal status and she is unable to return to her home country due to political instability in Ethiopia. Her alien I.D expired on 17.09.2022 and Sama had made many unfulfilled promises to have it renewed. F

10. Further, per exhibit MY10, the 1st and 2nd respondents refer to content moderators whether engaged by itself or by third parties as "our moderator". That shows how the 2nd respondent acknowledges how integrated Facebook Content Moderators are regardless of whether they are engaged directly by the 1st and 2nd respondents or through their partners such as the 3rd and 4th respondents. Per exhibit MY12, the 1st and 2nd respondents refer to the 3rd respondent as its partner in its official communications released via its website. It is stated at the website and per the exhibit, "Meta's review teams consist of full-time employees who review content as part of a larger set of responsibilities, as well as content reviewers employed by our partners. They come from different backgrounds, reflect our diverse community and have an array of professional experience – from veterans to legal specialists to enforcement experts in policy areas such as child safety, hate speech and counterterrorism. We partner with companies that employ over 15,000 reviewers who help in doing the job of reducing harm. Our review teams are global and review content 24/7. We have over 20 sites around the world, where

these teams can review content in over 50 languages. As an essential branch of our content enforcement system, review teams must have language proficiency and cultural competency to do their job well."

11. The 1st applicant Kiana Monique Arendse is a female adult, 24 years old South African Citizen. She has also filed a supporting affidavit. She states that she was employed by the 3rd respondent as a content moderator for the 1st and 2nd respondents' platform Facebook since 15.05.2021. She has repeated the account on the information on the redundancy as set out in the other two supporting affidavits. By exhibits filed (KMA11), she has repeated that the 1st and 2nd respondents refer to the 3rd respondent as partner. It is the applicants case that since the 1st respondent held out itself as a partner of the 3rd respondent it must be bound by the actions and omissions of the 3rd respondent.

12. The applicants filed on 24.05.2023 a bundle of certificates of authenticity with respect to exhibits of electronic origin relied upon by the applicants.

13. The 1st and 2nd respondents appointed Kaplan & Stratton

Advocates and learned Senior Counsel Dr. Fred N. Ojiambo, MBS appeared in that behalf together with learned counsel Ms. Elizabeth Onyango. The replying affidavit of Joanne Redmond, the Director and Associate General Counsel, Labour & Employment EMEA at Meta Platforms Ireland Limited, the 2nd respondent, was filed on 09.05.2023 for the 1st and 2nd respondents. It was urged and stated in the replying affidavit as follows:

a) The 1st and 2nd respondents are foreign corporates not resident or trading within the Court's jurisdiction and the affidavit was made under protest to the Court's jurisdiction. The Court had dismissed the application dated 24.03.2023 objecting to Court's jurisdiction and an appeal had been preferred.

b) The 1st and 2nd respondents are not employers of the applicants. The application dated 17.03.2023 was devoid of merit, incompetent and bad in law because it seeks prayers at variance with those in the petition.

c) The ex-parte orders given on 20.03.2023 in this matter had been in place for over a month and contrary to law.

d) The dispute is about a redundancy process being carried out by the 3rd respondent or Sama who have offices in Nairobi, Kenya. The petitioners (applicants) are employees of Sama by reason of written contracts of employment.

e) The prayers in the application are by way of mandatory injunctions which should not be granted at an interlocutory stage. Granting the orders would determine the dispute summarily without affording the respondents the right to be heard and offend the right to fair hearing.

f) The 1st and 2nd respondents being foreign corporates have the prerogative to conduct their business within the constraints of the law of their domicile and a Court should not intervene with a foreign corporate body's prerogative to govern its own affairs, subject to the laws of their domicile.

g) The 1st and 2nd respondents have no role or influence over redundancy process by Sama. The 1st and 2nd respondents cannot vary or extend the petitioners' contracts of employment because they are not privy to the contracts. Prayers (c) to (h)

are therefore inapplicable to the 1st and 2nd respondents.

h) The Court would in very limited circumstances interfere with any corporate's prerogative to govern its own affairs in relation to how it obtains business services, such as content moderation. There are no grounds to grant prayers (i) and (j) as prayed in the application as the 1st and 2nd respondents maintain a prerogative to engage any vendor company they deem fit and have no involvement in such vendor company's recruitment processes.

i) It has not by evidence been shown that the 1st and 2nd respondents are retaliating against the petitioners for filing the instant petition. The 1st and 2nd respondents are not within the Court's jurisdiction and it would be impossible for them to take any adverse actions against the petitioners on account of the filing of the instant petition. Thus no basis to grant prayers (m) and (n) of the application.

j) The petitioners were not at all material times the employees of the 1st and 2nd respondents. The 1st and 2nd respondents cannot

grant or refuse them medical care by virtue of their employment as prayed in prayers (o) and (p) of the application. If the orders are granted they would be redundant as against the 1st and 2nd respondents.

k) The meaning of prayer (q) "to regularize the immigration status of all the Facebook content Moderators" is not clear. There is no prima facie case established against the 1st and 2nd respondents.

l) The petitioners remedy, if any, lies in an award of damages and if the petition is found to be merited. Further the balance of convenience tilts towards disallowing the orders sought in the application.

m) That there is no basis in law to grant any of the orders as prayed for and the ex-parte orders of 20.03.2023 be discharged.

14. The 3rd respondent appointed Walker Kontos Advocates and Mr. Albert Omino Advocate appeared in that behalf. The 3rd respondent filed grounds of opposition to the application dated 17.03.2023 and stated as follows:

a) The application was brought after inordinate delay and as such the petitioners are guilty of laches and are therefore not entitled to the award of any of the equitable remedies sought in their application. A prayer for interlocutory injunction cannot be granted if a similar corresponding prayer for permanent injunction has not been sought as a prayer in the main suit or petition. Prayers (c), (d), (e), (f), (g), (h), (q), and (r) of the application have not been sought as permanent injunctions in the main petition. They are prayers *in vacuo* and cannot in law be granted as sought.

b) The prayers (o) and (p) of the application together with all averments set out in the supporting affidavits relating to the safety and working conditions at the 3rd respondent's organisation and to the 3rd respondent's hiring practices are *sub judice* to proceedings in **ELRC Constitutional Petition No. E071 of 2022 Daniel Motaung Vs Samasource EPZ ltd T/A Sama & Others** and are for dismissal and striking out respectively.

c) The applicants have not met the threshold for grant of temporary injunction namely a *prima facie* case with any chance of success The redundancy by the 3rd respondent was justified; the redundancy was in strict compliance with the law; the terminal dues were per, and, above minimum requirements. The petitioners will not suffer irreparable injury if the injunction orders are not granted because in the petition they seek in alternative payment of damages for unfair termination; payment of damages under section 49 of the Employment Act would be sufficient if found justified by the Court; and damages being possibly available, the injunctions cannot issue. Further the balance of convenience is in favour of the 3rd respondent because there is no work for the applicants to be assigned by the 3rd respondent; the 3rd respondent has ceased its content moderation undertaking and it has no income in that respect to pay the applicants if they continued in employment; capital constraints would result affecting the 3rd respondent' other 3, 000 staff; work permits

for the applicants will have to be processed by the 3rd respondent running into tens of millions so as to retain the applicants in Kenya as their work permits and temporary passes are up for expiry; no inconvenience to applicants who the 3rd respondent will pay terminal dues and meet repatriation expenses for foreign applicants; the 3rd respondent has already incurred expenses booking air tickets for applicants who are scheduled to head back to their home countries; and the applicants do not make the application on behalf of the section of content moderators who have already issued notices to their landlords and made arrangements to travel to their home countries but whose plan are in limbo due to the proceedings and orders already made by the Court.

15. The 3rd respondent also filed the replying affidavit of Annpeace Alwala residing in Nairobi and employed as the VP-Global Service Delivery of the 3rd respondent sworn on 11.05.2023. The replying affidavit state and urge to the following effect:

a) It is admitted that the 5th applicant Fascia Berhane Gebrekidan,

throughout her employment, has been physically going to work at Sama's (3rd respondent's) office located along Mombasa Road, Nairobi.

b) It is admitted and confirmed that the 5th applicant's work was undertaken through the SRT platform but clarify that since the petitioner's work involved moderating content posted on Social Media sites owned by the 1st and 2nd respondents, the moderation work could only be undertaken through the said SRT system which is a system specifically designed for that purpose.

c) The applicants' work was tracked by managers of the 3rd respondent and not Meta.

d) It is denied that the applicants cannot access their payslips as they are kept in cloud storage in full control of Sama. Instead, all employees who have a KRA Pin have an account in the Sage System which is the system used by the 3rd respondent to manage its human resource. For employees without an assigned KRA pin therefore not signed on the Sage system,

their individual payslips are shared by email at the end of every month. The payslips are therefore accessible and an employee is free to forward the payslip to individual email address at any time.

e) Is admitted that by email of 09.01.2023 the 3rd respondent invited applicants to a meeting on 10.01.2023. The purpose of the meeting was to notify employees that management of the 3rd respondent was ending its Content Moderation business in relation to which the 1st and 2nd respondents were its only client. Thus, the 3rd respondent intended to carry out redundancy. The 3rd respondent never stated at the meeting that Meta had refused to renew their contract with Sama. It was that the 3rd respondent had made a decision to focus on its computer annotation technology business. The 3rd respondent admit that it was communicated to 5th applicant by email of 10.01.2023 that the 3rd respondent would not be renewing its engagement with Meta. The email of 10.01.2023 was a redundancy notice per section 40 (1) (a) and timelines were set

out to enable the applicants to plan as some were foreigners and also providing full information to enable engagement in consultations. The copy of the letter of 10.01.2023 was served upon the Labour Officer as required by law.

f) There was no intention by the 3rd respondent to employ more people to do the annotation work related to artificial intelligence and which was 3rd respondent's core business and there were already staff in place.

g) It is admitted that another redundancy notice was issued dated 18.01.2023 extended last working date to 31.03.2023. Four consultative meetings were held in relation to the redundancy decision. A link was provided for affected employees to fill in and raise concerns. Employees raised many concerns about general feedback, clarity on redundancy, travel arrangements, immigration, housing, wellness support, pension, etc. The first consultation meeting was on 18.01.2023, the second on 02.02.2023, the third on 21.02.2023 and the fourth on 28.02.2023. Consultations went beyond amount of money

payable. By feedback forms employees were invited to give views on alternative ways of restructuring and gave views at the meeting of 18.01.2023.

h) All positions of content moderators were being abolished and the question of selection criteria did not therefore apply to the termination of content creators.

i) Filling the feedback forms and airing views at town hall consultative meetings constituted effective way of driving consultations on the redundancy.

j) The termination notice dated 08.02.2023 was issued 30days after issuance of the initial notice of intention to declare redundancy. The contents of the termination notice are admitted.

k) The issue of terminal dues was exhaustively discussed at the meetings.

l) The redundancy was undertaken in strict compliance with the law.

m) That the matters set out and alleged about toxicity and adverse

health impacts of the work of content moderators are *sub judice* as they are directly in issue in **ELRC Constitutional Petition No. E071 of 2022 Daniel Motaung Vs Samasource EPZ ltd T/A Sama & Others** and should be struck out.

n) The letter of offer clearly stated the engagement as Content Moderator. The content moderators were taken through training prior to start of working. Samples of the content they would be called upon to moderate as part of their work were displayed during the training. They were also assessed by wellness professionals to determine their levels of resilience and their ability to handle stress and difficult content before they ever start any content moderation work. Recruits are free to reject the engagement and those who fail resilience test are allowed to drop out.

o) That training was rushed as alleged for applicants is an afterthought. There are no grievances raised at material time in that regard.

p) The insomnia and mental or other adverse medical complaints

by the applicants if at all they exist are not attributable to the 3rd respondent or the applicants' employment.

q) The 3rd respondent has put in place measures to reduce the jarring effects of any graphic content the applicants may be exposed to including. For images, blurring of images being reviewed by the content moderators, presenting images in black and white, blocking the faces of people in the pictures, hiding recently seen images and adding warning screens. For videos, blurring the video previews, blurring the video, presenting the videos in black and white, muting the videos, and default video volume. The content moderator has setting options the select and use as preferred. Further the 3rd respondent has provided qualified counsellors who are available to the content moderators 24/7. Exhibit AA 13 are copies of the Counsellors being associate or accredited counsellors by the Kenya Counselling and Psychological Association. The content moderators have standing scheduled sessions with the Counsellors every two weeks and a content

moderator can schedule a session with the Counsellor at any time they feel the need to. The 3rd respondent's wellness policy is exhibited. It is the 3rd respondent's case that Counsellors are equipped to refer individual employees for specialised treatment. The content moderators are provided medical insurance cover for treatment of any mental health being Kshs. 1,000,000.00 inpatients and Kshs. 50,000.00 outpatients. There are no alleged or reported cases of the cover being depleted and they cover mental health treatment. No employee has suffered without access to medical cover. It is not true that the Counsellors are helpless and unable to assist the content moderators. They are well equipped professionals able to deal with any difficult or disturbing situations.

r) There is no pressure for a content moderator to review content within 60 seconds as alleged. The speed and number of content items reviewed per day is not part of performance parameters to place a content moderator on a Performance Improvement Plan (PIP) or termination on account of poor performance and

the PIP policy is exhibited.

s) Content moderators have an hour lunch break and two tea breaks each of 15 minutes. They can take bathroom breaks any time as they wish and there are no restrictions in that regard as alleged for applicants.

t) Employees have not been gagged by reason of the earlier petition filed before the Court by a content moderator. An email was issued to employees conveying the Court order that the matter not be discussed in the press. The email therefore stated that all media inquiries be through the 3rd respondent's office so as to ensure compliance with the Court order.

u) Content moderation was not the 3rd respondent's core business and having terminated its content moderation service, the content moderators were rendered redundant.

v) The 3rd respondent entered into two separate service provision contracts with the 1st respondent, one for content moderation and the other for Annotation. The service delivery requirements under the two contracts are separate and distinct.

The qualifications for content moderation are different from those for annotation. The job descriptions are equally different. The tools and policies used for content moderation are remarkably different from those used for annotation.

w) The 3rd respondent is not a partner of the 1st and 2nd respondent. The relationship is as follows. The 3rd respondent's parent company entered into an agreement with the 1st respondent in which the 1st respondent outsourced its content moderation function to the 3rd respondent's parent company. The 3rd respondent's parent company then sub-contracted the content moderation work to the 3rd respondent. Outsourcing is an acceptable practice in Kenya and is recognised as such by law. Thus, there is no direct legal relationship between the 3rd respondent and the 1st and 2nd respondent. Further, the relationship between the 3rd respondent's parent company and 1st respondent is purely that of service provider and service recipient.

16. The said replying affidavit of Annpeace Alwala responds to

the supporting affidavit of Mahlet Yilma Lemma the 34th applicant to the following effect:

a) It is admitted that she was recruited to work as a content moderator being an Amharic speaker. It is that she was trained prior to embarking on the job as stated in her affidavit.

b) The process of content moderation is in accordance with the policies and guidelines of the 1st respondent but the content moderators hire by the 3rd respondent are at all times under the control of the 3rd respondent who enforce the content moderation quality standards.

c) The mental wellbeing of the content moderators was one of the 3rd respondent's top priority and the same was one of the respondent's top priority and the same was sufficiently catered for.

d) It is impossible as alleged that time for auctioning a ticket was 60 seconds and that the 34th applicant actioned up to 1000 tickets in a day – that she worked averagely 16 hours per day and which was not the case.

e) The applicant sought only one week shift to day shift and she was granted per the request. She never made further requests and the same denied.

f) During redundancy in issue, the extension of the last working day was informed by a request by the 1st respondent to extend the provision of content moderation services to that date to enable their new service provider to finish setting up and taking up the task. It was not mandatory for the employees to work to the extended deadline. Those who wanted to leave by 28.02.2023 were allowed to do so. Those who worked up to end of March 2023 were offered an ex-gratia payment as an incentive. The extension did not negate he validity and existence of the redundancy situation.

g) The 3rd respondent expected increased demand for wellness counsellors and the 3rd respondent ensured more counsellors were available and directed that any employee who wished to see the counsellors could do so immediately.

h) The redundancy situation did not arise as a retaliation but it

was that the 3rd respondent no longer needed positions of content moderators. It made a decision to stop offering content moderation services to focus on other aspects of their business. It was its prerogative to make such decision. Every content moderator in its employment had their positions abolished. The issue of selection criteria does not therefore arise.

i) All employees who are not Kenyan are entitled under their contract of employment to travel facilitation for purposes of repatriation to their home countries. Any employee who wanted to stay in Kenya and had made their own immigration status arrangements were free to stay at their pleasure and all they needed to do was inform the 3rd respondent of this position.

17. The 4th respondent filed the replying affidavit of Sven Alfons A De Cauter, its Director, and through Munyaka Advocates LL.P. Learned Counsel Mr. Mbatia and Mr. Wachira appeared in that behalf. It was stated and urged as follows:

a) The application by the petitioners dated 17.03.2023 is

baseless, unfair, unreasonable, unduly prejudicial and has been overtaken by events so that it cannot be awarded or enforced. it is based on rumours, unverifiable documents and insufficient evidence to support it together with the orders prayed for.

b) Orders prayed per (i), (j) (k) and (l) affect the 4th respondent and the applicants have not given sufficient evidence or grounds to support the prayers.

c) The petitioners are not the only qualified persons to conduct content moderation work in the region. The 4th respondent has conducted content moderation work in Kenya and around the world and it is capable of training staff to conduct the work. The recruitment the 4th respondent has undertaken for content moderators is across Kenya and Africa where there are candidates who have the capacity and experience to conduct content moderation work. The 4th respondent and not the petitioners knows the job requirements and therefore sets the recruitment criteria and has the sole discretion to assess the suitability of any applicant for the positions it has.

d) The court cannot, as invited by the petitioners, to sit as a recruiter and to find the petitioners to be the best suited for the job usurping the right and prerogative of the 4th respondent to assess and hire employees according to its needs and requirements which only it knows and can determine.

e) The 34th petitioner applied to be recruited by the 4th respondent per her exhibit MY9 and the email acknowledged receipt of her application but by itself it does not show how the petitioner was discriminated against her or different treatment. That she was not hired as a retaliation for Daniel Motaung's earlier suit is not true as the 4th respondent was never a party to that suit. The said Daniel Motaung is a stranger to the 4th respondent.

f) The applicants pray that no content moderation work be done by the 4th respondent for the 1st and 2nd respondent in the Eastern and Southern African Region. Such orders if granted will unduly and disproportionately prejudice the 4th respondent as is calculated to attempt to cause it financial ruin and even the possible redundancies of other content

moderation staff the 4th respondent has already hired. The 4th respondent has heavily invested to undertake the content moderation project. The 4th respondent has commenced and completed a recruitment exercise in East and Southern Africa following which it has hired staff, undertaken their relocation to Kenya, paying their salaries, benefits, accommodation and sustenance and started training in anticipation to take up the content moderation work. It has leased office space for the content moderation project which it has fitted out and for which it is currently paying rent and service charge. It has purchased and set out all ICT and other office resources such as computers, desks, chairs, printers, communications infrastructure and others to support the content moderation project. It has hired and retained other administrative staff. The investment is in hundreds of millions of Kenya Shillings and with ongoing contractual obligations. If orders are granted as prayed for, there will be serious prejudice to the 4th respondent namely loss of income expected from the project, investment

will be lost, hired staff in the project will be rendered redundant, and, on-going contracts will be frustrated.

g) If the applicants are aggrieved by the ongoing redundancy, remedy of damages will be available to them.

h) The applicants are denying the 4th respondent the benefit of opportunity of a trial at which all claims can be addressed.

i) The petitioners are prosecuting their case in the media where the 4th respondent obtained the pleadings from a journalist even prior to service of the suit papers upon the 4th respondent. Negative news about the 4th respondent followed. The 4th respondent has therefore suffered unfairly in the Court of public opinion. The 4th respondent deserves protection by the Court in view of the immeasurable harm already suffered.

j) The 4th respondent filed the further replying affidavit of Sven Alfons A De Cauter sworn on 24.05.2023. It is stated that as at 01.03.2023 the 4th respondent had made an investment of approximately Kshs.200, 000, 000.00 covering recruitment, payroll, accommodation for staff, immigration permits, capital

expenditure and other setup costs. Further, as from 1st April 2023 the 4th respondent will be liable for monthly expenses of approximately Kshs. 50,000.00 relating to employee compensation, accommodation, employee seat costs and other support costs. As long as interim orders made preventing it from performing the content moderation project remain in place the revenue expected to cover the risk and expenses will be lost. The real consequences of the orders be considered by the Court and the ad-interim orders be vacated. The Court observes that no exhibits or particulars relating the monetary statements in that affidavit were exhibited.

18. The 3rd respondent filed supplementary affidavit of Annpeace Alwala sworn on 11.04.2023. It was stated that to keep the content moderators at work up to 12th April, 30th April and then 31st April would cost are Kshs. 11, 506, 828.62; Kshs. 22, 928, 932.72; and Kshs. 42, 073, 246.60 respectively A further Kshs. 17, 929, 713.67 will be incurred in processing work permits and requisite security bonds. The schedule was annexed as AA1 without any further

exhibits.

19. The 1st petitioner's supplementary affidavit in support of the application dated 17.03.2023 was sworn on 23.05.2023. It was stated and urged as follows:

a) Annepeace Alwala swore a replying affidavit on 27.03.2023 before Kamau Minjire Advocate who last held a practicing certificate in 2022 and could not therefore lawfully commission the affidavit. The supplementary affidavit of Annpeace Alwala sworn on 11.04.2023 was as well purportedly sworn before the same Kamau Minjire who at material time did not as well hold a valid practicing certificate. That under the Oaths and Statutory Declarations Act, an Advocate without a valid practicing certificate cannot validly commission perform the work of a Commissioner for Oaths. The subsequent affidavit sworn on 11.05.2023 said to be a replacement of the one of 27.03.2023 was without leave of Court and should be struck out. The supplementary affidavit sworn on 11.04.2023 was never replaced. It ought to be struck

out as incompetent.

b) During redundancy process as initiated the 3rd respondent never discussed the alternative options with the applicants.

c) The wellness Counsellors were never offered to render support during the redundancy period.

d) After Daniel Motaung filed Petition E071 of 2022, the 3rd respondent emerged with a pattern of retaliation including tense work environment with unbridled hostility; many content moderators lost job over minor infractions; redundancy in issue was invoked; there were shortages of content moderators for various markets with repeated requests for hiring but none was hired; content moderators with lapsing contracts had their contracts not renewed; and those whose contracts lapsed after September 2022 were lured to sign month to month contracts.

e) Annpeace states that redundancy decision had been made in 2022 but applicants had not been informed at all. Termination timelines for foreign applicants were extremely limited.

f) She admits at paragraph 129 (b) that when the 1st and 2nd respondents terminated the service contract, then there was no work for content moderators. That contradicts the position that 3rd respondent decided not to engage in content moderation business per redundancy notices- that 3rd respondent wanted to focus on other projects. The reason for redundancy is not genuine in view of such contradiction. There is content moderation work to be done and the 3rd respondent is choosing not to retain the applicants to do it as shown by the 4th respondent's engagement to undertake the same.

g) The job imposed a serious metal toll and the applicants may never be able to secure and undertake other jobs.

h) The 3rd respondent admits that content moderators who wanted to leave already left the country.

i) The petitioner could not be filed any earlier than was filed because the applicants had no instrument to tell that the 3rd respondent was going to proceed with the redundancy unlawgfully.

j) The 3rd respondent has provided no evidence to support exhibit AA1 on the supplementary affidavit to justify the claimed financial impact. Being a subcontractor, it is not by itself liable in pecuniary impacts but the 1st and 2nd respondents are the ones incurring the financial impact of the moderators. The partners 1st and 2nd respondents are available to salvage the 3rd respondent's said financial predicament. The protection of the bottom line cannot override the protection of constitutional rights and freedoms.

k) The 4th respondent filed the replying affidavit sworn on 27.03.2023 and further affidavit sworn on 27.03.2023 both commissioned by one Norbert Jude Oduor Onyango who at material time had no practicing certificate and was incompetent per Oaths and Statutory Declarations Act. The Law Society of Kenya confirmed as much be the letter dated 29.03.2023. The affidavits should be struck out.

l) The alleged loss of loss by the 4th respondent is not backed with relevant exhibits or particulars to demonstrate the same.

m)If the prayers as made are not allowed the applicants will not have means to sustain themselves pending the hearing and determination of the petition and it will amount to irreparable injury. Further irreparable injury is deportation to home countries some of which are under civil strife and the petitioners will be unable to prosecute the petition. Such are serious irreparable injuries.

n) The applicants are not in control about whatever the press writes about the 3rd respondent. After interim orders issued, the applicants served the orders upon the 4th respondent the following day.

o) The 4th respondent has not demonstrated the harm they will suffer if the applicant's interim prayers are granted.

20. The 5th petitioner swore a supplementary affidavit on 23.05.2023. it was stated and urged as follows:

a) The replying affidavit by Joanne Redmond is notarised in Ireland ad sworn on a future date namely 08.06.2023. Ireland is a country outside of the Commonwealth of Nations. By law

the affidavit ought to have been accompanied by documentation authenticating the qualifications of the notary who notarised it. In absence of such documentation, it is not admissible in Kenyan Courts.

b) The 1st and 2nd respondents being corporates outside the Court's jurisdiction, the Court granted leave that they get served.

c) The 1st and 2nd respondents provided the work that the applicants performed, the system they worked in, the policies and guidelines they used when doing the work, they provided the funds for payment of their salaries, and, monitored the manner the applicants worked. Thus, they were the applicants' employers in every sense.

d) The 1st and 2nd respondent filed a replying affidavit on 09.05.2023 after considerable delay and their application having been dismissed on 20.04.2023. The 1st and 2nd respondents have not demonstrated how they are affected by the interim orders already in place given pending hearing and

determination of the application and to protect the applicants' rights in the interim.

e) The 1st and 2nd respondents have the power to extent the applicants' contracts of employment. The 1st and 2nd respondents provide the work of content moderation to the 3rd respondent who has repeatedly admitted that the only reason for the redundancy is the end of the outsourcing contract.

f) The 3rd respondent was able to extent the content moderators' contracts from 28.02.2023 to 31.03.2023 demonstrating that the 1st and 2nd respondents are making a deliberate decision not to extent the applicants' contracts. When the orders are granted, it is not to interfere with the 1st and 2nd respondents' contracts. It is to prevent the 1st and 2nd respondent from using and dumping the applicants and moving on to a new provider and hiring new people and leaving the applicants out in the cold.

g) The 1st and 2nd respondents need not to have been physically in Kenyan jurisdiction to have caused the adverse actions

against the applicants.

h) The relationship between the 1st and 2nd respondents, and, the applicants, is complex but it does exist.

i) The 3rd respondent has confirmed that the content that the applicants were moderating belonged to the 1st and 2nd respondents and that the applicants were doing the work through the SRT, a proprietary system designed by the 1st and 2nd respondents. Through the SRT the 1st and 2nd respondents were able to do the following: issue the content moderators with tickets to handle moment to moment; issue the moderators with tools they were to employ to do the work, that is, the Facebook Community Standards; issue them with performance metrics they were to adhere to i.e. the average handling time and the accuracy metrics they were to meet – the evaluation was eventually reflected in their pay slips as part of performance based payment; and, kept track of the time they spent working including how much time they spent on bathroom breaks. Further, all the graphic, disturbing, toxic,

dangerous and harmful video they watched was part of the work directly served by the 1st and 2nd respondent directly. SRT kept their performance metric and managers hired by the 3rd respondent only picked the information on the moderators' performance from the SRT and reflected that on the payslips.

j) The money paid to the moderators came from the 1st and 2nd respondent and was released based on individual performance such as bonuses if deserved were factored in the money the 1st and 2nd respondents sent to the 3rd respondent to pay the moderators.

k) The 3rd respondent has locked the applicants out of the Sage system and the email addresses and they cannot access any document about their employment such as emails on contract extension, redundancy notices or payslips. Annexure AA2 shows a manager sending a payslip to a member of staff confirming inaccessibility. The access to emails was locked after filing of the present petition.

l) Exhibit AA3 is a notice to the Nairobi County Labour Office.

The reason given is that the 3rd respondent had lost their service delivery contracts. That was not the reason given to the applicants for the redundancy imposed by the 3rd respondent. The labour officer was informed positions to be lost yet applicants were individually informed they would be affected. It was misrepresented that consultation would take place. It was misrepresented to the officer that they would make every effort to retain and redeploy as many employees as they could as at 10.01.2023 the same date the letter to the officer is dated, all the content moderators were being informed that they were to be sent home as at 28.02.2023 with no discussion of the option to be retained or redeployed. A letter per exhibit AA3 was never given to the applicants and they have seen it in Court. All content moderators received the same notice being MY7 and KMA3 on the supporting affidavits. There were no consultative meetings. The 3rd respondent had other jobs but there was no conversation about the applicants being considered accordingly.

m)Exhibit AA4 shows redundancy was coordinated by the 1st, 2nd and 3rd respondents because as early as 13.01.2023 the 1st, 2nd and 3rd respondents were discussing about the "ramp of the new vendors" meaning the 1st and 2nd respondents were already in talks engaging a new vendor to conduct content moderation, the 4th respondent. The coordinated the same including details on the last day of work.

n) The email of 18.01.2023 communicated that the last working day was extended from 28.02.2023 to 31.03.2023 to give more time for applicants to prepare themselves for the job loss. In paragraph 21 of the replying affidavit it is shifted to the reason for extension as 1st and 2nd respondent requested for an extension to enable their new service providers to be able to begin work. Such contradictions show lack of genuine reasons to undertake the redundancy but that the 1st, 2nd and 3rd respondent were in cahoots to get rid of the applicants. The redundancy was at the behest of the 1st and 2nd respondents who had the option to absorb the applicants into their new

vendor but failed to do so and instead they were blacklisted from being so engaged.

o) There were no consultations. Conversations were about post redundancy and package communicated as decisions already made. No suggestions were invited on restructuring of the business. The termination letter had the breakdown of the dues and seen by applicants for the first time.

p) The applicants are entitled to access justice to protect and enforce their own rights just like Daniel Motaung is as well entitled. There is no issue of *sub judice* as they are separate causes of action. The earlier petition does not determine the matters in issue in the instant petition.

q) At engagement, the job was known as content moderation, but its scope and meaning was not explained. Potential adverse effects of the job were not explained at all. The training was rushed and taking of notes was not allowed.

r) The blurring features during the moderation would lead to wrong decision thus a penalty to a moderator. The feature was

unavailable as using it also meant taking more time to make a decision.

s) The wellness counsellors had no qualifications as psychiatrists. Time taken to attend to counselling was deducted from the shift allocation. They were not allowed to talk to counsellors about the nature of work. The wellness certificates and schedule as exhibited are not authenticated at all. The medical cover did not cover metal health support. Outpatient caver of Kshs. 50,000.00 was insufficient to attend psychiatric attention and applicants had to pay out of their resources but which they lacked. Counselling was in batches of groups and no personal confidentiality was assured hence not useful.

t) Performance parameters were speed, volume, and accuracy or decisional quality. 1st and 2nd respondent had prescribed average handling time (AHT). So speed was a parameter in performance measurement. The breaks were one hour only inclusive tea breaks. Bathroom breaks were counted as time

out of productions and instructions were clear about that.

u) There was a partnership between the 1st, 2nd and 3rd respondents. The 1st, 2nd and 3rd respondents disregard their relationship, they are jointly liable for violating the applicants' rights.

21. The parties' respective Counsel made written submissions and oral submissions to urge their clients' respective positions on the application dated 17.03.2023. The Court has considered the material on record in that regard and returns as follows on the pertinent issues for determination.

22. The **1st issue** for determination is whether the replying affidavit of Joanne Redmond filed for the 1st and 2nd respondents should be struck out. It is submitted for the applicants that that affidavit states that it was sworn on 08.06.2023 and was filed electronically on 09.05.2023. Thus it was sworn on a futuristic date long before its filing, the hearing of the application and is therefore incompetent and ought to be struck out. It is submitted for the applicants that section 5 of the Oaths and Statutory Declarations Act

states that every commissioner for oaths before whom any oath or affidavit is taken or made under the Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. In **Transmara Sugar Company Limited –Versus-Hosea Muga & Another [2021]eKLR**, Wendoh J stated, "I also note that the appellant's application is dated 11/10/2020 but it was filed on 8/10/2020. How possible is it to file an application which has a future date? On ground number 2 on the face of the application, the appellant refers to a contempt application dated '11/9/2020'. I am not aware of such an application filed before the Court. I am not certain what counsel for the appellant wished to communicate to this court. This court would expect that after the Respondent filed their reply, the applicant's counsel would bother to correct the glaring errors raised by the Respondent but counsel never did." It was submitted that accordingly, the affidavit with a futuristic date on the jurat was incompetent. It was further submitted that the affidavit stated it was taken in Ireland and it was necessary that the same be authenticated considering that Ireland is not a country in the

Commonwealth per exhibit FGB 16 of the supplementary affidavit of Fasica Berhane. It was submitted for the applicants that section 88 of the Evidence Act Cap 80 that only documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it. The applicants relied on Ringera J in **Pastificio Lucio Garofalo SPA –Versus- Security & Fire Equipment Co. & another [2001]eKLR** holding that an affidavit that was taken in Napoli Italy, had to be proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of the said Notary Public. The 1st and 2nd respondent's affidavit not being authenticated in that respect as required under section 88 of the Evidence Act Cap 80 it is fatally defective and incompetent and inadmissible. It must be struck off the record.

23. The 1st and 2nd respondents have not addressed the issue in their written submissions. In the oral submissions, Dr. Fred Ojiambo SC submitted that the date of 08.06.2023 on the replying affidavit

was clearly a mistake The exhibits on the replying affidavit are done on 08.05.2023. It was submitted that the error was clerical mistake, an accidental slip in the jurat and the Court to excuse it under the slip rule. Senior Counsel invoked Order 19 rule 7 that the Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality. It was further submitted that under rule 3 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 the overriding objective of the rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution. Further, the rules shall be interpreted in accordance with Article 259(1) of the Constitution and shall be applied with a view to advancing and realising the— (a) rights and fundamental freedoms enshrined in the Bill of Rights; and (b) values and principles in the Constitution. On authentication, it was submitted that section 88 of Evidence Act did not require that the the signature and seal of attestation affixed by

the Notary Public outside the Commonwealth be authenticated. Ringera J in **Pastificio Lucio Garofalo SPA –Versus- Security & Fire Equipment Co. & another [2001]eKLR** holding was that the affidavit would be struck out because the they were in Italian language and not English which was the language of the Court – so that it was an issue of the language of the Court.

24. The Court has considered the rival submissions. Ringera J in **Pastificio Lucio Garofalo SPA –Versus- Security & Fire Equipment Co. & another [2001]eKLR** stated thus, "**As regards whether the affidavit is taken before a Notary Public, there is no specific statute in Kenya or rules of court dealing with the formalities and admissibility in Court of affidavits taken abroad. However, section 88 of the Evidence Act, Cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by**

virtue of order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp and seal or the official position of the person taking the affidavit. It accordingly follows that the same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Napoli, Italy, has to be proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of such Notary Public. There is no such proof here. It may very well be that the certificates in Italian and the other writing in Italian was meant to do that. However, as there was no translation of the same into English-which is the official language of the High Court-this Court cannot and will not know the position. In the result I find the verifying affidavit of Emile Viola inadmissible in evidence and I would order the same struck out of the record." The Court finds that the holding was that

the affidavits notarised outside the Commonwealth needed authentication certificate or affidavit as submitted for the applicants herein and further, that in that case, the documents that were annexed might have been such certificate or affidavit of authentication but being in Italian rather than in English – the language of the Court, it was impossible for the Court to determine one way or the other. There is no dispute that the jurat had a futuristic date. As was stated by Wendoh J in the cited case, the proper action was to correct the same by filing an appropriate replying affidavit. The Court has considered the submissions on the overriding objectives and returns the futuristic date in the jurat went to the root of the affidavit namely, whether indeed the said Joanne Redmond actually ever appeared before the purported Notary Public. The Court has considered that an affidavit is not a pleading as such amenable to amendment and obviously is not a document by the Court so that it appears that invoking the slip rule is unavailable as a corrective measure. Accordingly, the said replying affidavit by Joanne Redmond is inadmissible in evidence and the Court would

order the same struck out of the record. While making that finding, the Court has considered that the replying affidavit was largely about points of law upon information by Senior Counsel for the 1st and 2nd respondents and which in any event have been urged in the submissions made for the two respondents.

25. The **2nd issue** for determination is whether the replying affidavit for the 3rd respondent sworn on 27.03.2023 by Annpeace Alwala, a further affidavit sworn on 11.04.2023 by Annpeace Alwala, and a replying affidavit sworn on 11. 05.2023 by Annepeace Alwala should be struck off the record. It is urged for the applicants that the affidavits sworn on 27.03.2023 and 11.04.2023 were commissioned by one Kamau Minjire Advocate and who at the material time did not hold a practicing certificate for the year 2023 and as confirmed by the Law Society of Kenya. The 3rd respondent's Counsel does not dispute that fact and as submitted for the applicants, the affidavits are hereby struck out from the Court's record. The 3rd respondent filed the replying affidavit sworn on 11. 05.2023 by Annepeace Alwala and served it upon the applicants as

a replacement of the replying affidavit she had sworn on 27.03.2023. It is urged that the affidavit sworn on 11.05.2023 was filed and served without leave and ought to be struck out. The applicants rely on the holding by Onyango J in **Caltex Oil (Kenya) Limited – Versus- New Stadium Services Station Lld & Another [2002]eKLR** thus, "**Further, it was wrong for the Applicant to file these three affidavits without leave of the court and now seek to have the court stamp that irregularity and make it valid. I would not do so. No reason has been given as to why the affidavits sworn on 8th February 2000 were filed without leave of the Court.**" Further, in **Mutua –Versus- Anwarali & Brothers Limited [2003]eKLR**, Sergon J held, "**Basically this application raises two issues to be decided. First, whether the affidavit is fatally defective. Mr Anjarwalla quoted the case of Central Bank of Kenya and Reliance Bank Ltd (unreported) Nairobi HCCC Misc Application No 427 of 2000 in which Jeanne W Gacheche, Commissioner of Assize (as she then was) dismissed the affidavits in support because the jurat appear on separate**

pages from the main text. Of course this is an authority *per incuriam.* It is only persuasive to me. Before I decided on this point, it is worth to note that the defective affidavit surprisingly is no longer on record. It was mysteriously and unprocedurally removed or withdrawn from the Court record. Miss Munene who appeared for the plaintiff informed court that the offending affidavit had been withdrawn from the court record and a proper one filed 22.10.2002. This Court does not have the benefit of considering the issue of defective affidavits at this stage because the defective one has been withdrawn. I can only say that it is important for advocates being officers of this court to be honest and fair to court. It is improper, dishonest, deceitful and discourteous for an Advocate to withdraw pleadings, documents or affidavits from court records without a Court order so to speak. This actually amounts to professional misconduct and such an officer is short of professional etiquette. This behaviour should stop and must cease. In fact, had the Court been alerted earlier about the unlawful withdrawal of the

defective affidavit, this Court could have refused to give audience to the particular advocate. This should be the practice by this Court in order to protect and safeguard the integrity of the legal profession." Mr. Omino Advocate for the 3rd respondent submitted that the replying affidavit was filed on 11.05.2023 with leave of Court and there was no rule that a party files only one replying affidavit. The Court has perused the record and returns that indeed on 27.04.2023 the Court ordered that the respondents to file answer to petition, the replying affidavits to petition, the replying affidavits or supplementary affidavits to the injunction application and contempt applications and to serve by close of 10.05.2023 and the petitioners may file and serve further affidavits in response thereto by close 19.05.2023. The Court finds that as submitted for the 3rd respondent, the affidavit was filed with leave although one day late and which the Court would excuse in view that the matter had been certified urgent. Further, the applicants had opportunity to file supplementary affidavits and responded extensively to all matters the replying affidavit sworn on 11. 05.2023 by Annepeace

Alwala and whose contents were substantially similar to the earlier affidavit already struck out. The Court considers that in the circumstances, no party will suffer prejudice as the replying affidavit sworn on 11. 05.2023 by Annepeace Alwala would be allowed on record as duly filed and served.

26. The **3rd issue** is whether the replying affidavit by Sven A De Cauter sworn on 27.03.2023 and further affidavit sworn on 12.04.2023 should be struck out from the record. It is submitted for the applicants that the affidavits were commissioned by one Onyango Nobert Jude Oduor and who did not hold a practicing certificate for 2023 as confirmed by the Law Society of Kenya per exhibit KMA 12 on the supplementary affidavit sworn by Kiana Monique. It is submitted that the affidavit fails to meet the mandatory provisions of sections 2 of the Oaths and Statutory Declarations Act as read with section 9 of the Advocates Act requiring that a commissioner for oaths to be an Advocate with a current practising certificate. That the affidavits amount to mere statements of facts that do not attain the threshold of affidavits for

purposes of evidence. The affidavits filed for the 4th respondent should therefore be struck out. While submitting that the 4th respondent filed fresh affidavits to correct the irregularity, submissions made for the 4th respondent do not specify the maker of such fresh affidavits, the date they may have been sworn, filed or served. The alleged further affidavits appear not to be on record. Accordingly, the Court returns that Article 159 (2) of the Constitution or order 19 rule 7 do not help to cure the substantive irregularity going to the substance and validity of the two affidavits filed for the 4th respondent. The Court would therefore strike them out from court record, accordingly, and as submitted for the applicants.

27. The **4th issue** is whether the 1st and 2nd respondents are employers of the applicants or the 3rd respondent was the sole and only employer of the applicants. The Court will rely on statutory provisions and the decided cases on principles guiding determination of existence of the contract of service and then employer or employee status. Sections 2 of both the Employment

Act, 2007 and the Employment and Labour Relations Court Act, 2011 defines "**employee**" and "**employer**". Employee means a person employed for wages or salary and includes an apprentice and indentured learner. Employer means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. The Court considers that the statutory definition is consistent with **Cable & Wireless Plc –Versus P. Muscat [2006]EWCA Civ. 220** where it was held that so long as the remuneration was provided by the employer, it mattered not that it was not paid directly but through some other arrangement made by the employer, and, the fact that a person who would otherwise be the worker's employer did not cease to be his employer simply by arranging for the wages to be paid via a third party(per majority in **Dacas case** cited therein) and further, "**35. In our opinion, the view of the majority in Dacas was correct. The essentials of a contract of employment are the obligation to provide work for**

remuneration and the obligation to perform it, coupled with control. It does not, in our view, matter whether the arrangements for payment are made directly or indirectly...."

28. In **Everret Aviation Limited –Versus- Kenya Revenue Authority (2013) eKLR** Kimondo J held, **".... In determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer's core business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical."**

29. The Court is guided accordingly and the Court has mapped the parties' claims and evidence to the outlined tests for determination of existence of a contract of employment, employer and employee. What were the engagement and applicable terms, conditions, rights, and obligations amongst the applicants on the one hand and, the 1st,

2nd and 3rd respondents on the other as well as, amongst the three respondents? The Court has considered the material on record. First it is a mutual position by the applicants and by the 3rd respondent that the work of content moderation actually belongs to the 1st and 2nd respondents and the work was undertaken through the 1st and 2nd respondents' digital resources and digital workspace per the 1st and 2nd respondents' digitally provided operational and policy requirements. In her replying affidavit Annpeace Alwala admits that the applicants' performance was undertaken through the SRT platform and the applicants' work involved moderating content posted on Social Media sites owned by the 1st and 2nd respondents and the work could only be undertaken through the SRT system designed for that purpose. By that admission and as urged for the applicants, the 3rd respondent has confirmed that the content that the applicants were moderating belonged to the 1st and 2nd respondents and that the applicants were doing the work through the SRT, a proprietary system designed by the 1st and 2nd respondents. As urged for the applicants, through the SRT the 1st and 2nd respondents

were able to do the following: issue the content moderators with tickets to handle moment to moment; issue the moderators with tools they were to employ to do the work, that is, the Facebook Community Standards; issue them with performance metrics they were to adhere to i.e. the average handling time and the accuracy metrics they were to meet – the evaluation eventually being reflected in their pay slips as part of performance based payment; and, kept track of the time they spent working including how much time they spent on bathroom breaks. The Court returns that by the material affidavit evidence on record, all the graphic, disturbing, toxic, dangerous and harmful videos they watched was part of the work directly served or provided by the 1st and 2nd respondent directly. SRT kept their performance metric and managers hired by the 3rd respondent only picked the information on the moderators' performance from the SRT and reflected that on the payslips. The Court returns that it is the 1st and 2nd respondents who owned the job and therefore had the obligation to provide the job. The Court returns that the 1st and 2nd respondents were the primary or principal

employers of the applicants and the 3rd respondent was merely the agent, foreman, manager or factor of the 1st and 2nd respondents as per the definition in the Employment Act, 2007 – and there being no dispute that the Kenya's employment law applied to the contracts of service. As was held in **Cable & Wireless Plc –Versus P. Muscat [2006]EWCA Civ. 220** the essentials of a contract of employment are the obligation to provide work for remuneration and the obligation to perform it, coupled with control. It does not matter whether the arrangements for payment are made directly or indirectly. In the instant case the evidence is that the obligation to provide the digital work of content moderation belonged to the 1st and 2nd respondents who provided the digital or virtual workspace for the applicants. The 1st and 2nd respondents exercised control by imposing the operational requirements and standards of performance. The 1st and 2nd respondent then provided the remuneration but through their agent, the 3rd respondent. The 3rd respondent has confirmed as much when it laments if the redundancy decision is not upheld, it will incur untold losses. The

4th respondent has confirmed as much by submitting that a delay in their undertaking the 'content moderation project' and implying the project is about the work otherwise undertaken by the applicants, its investment and expected income will go to waste.

30. The Court has considered the contracts of service given to the applicants. The typical contract is in exhibit FGB2 of the supporting affidavit of Fasica Berhane Gebrekidan sworn on 17.03.2023. The offer of employment email dated 02.04.2021 states that she was successful in the interview for the position of Content Moderator subject to background checks. The expatriate pay and benefits for the job to be undertaken in Nairobi included basic salary inclusive of house allowance Kshs. 40,000.00 per months; out of country allowance Kshs. 20,000.00; medical cover for self; subsidized lunch at office cafeteria; and work permit processing costs for successful candidates to be borne by Sama. The monthly gross pay of Kshs. 60,000.00 was subject to tax known as Pay As You Earn (PAYE) and also subject to statutory deduction of Kshs. 1,300.00 NHIF and Kshs.200.00 NSSF. A monthly payslip would issue. A return ticket

per year during annual leave from Nairobi to current city of residence and back to Nairobi. The letter does not refer to any other terms and conditions of service. The employer is not identified. The tenure is not stated but by implication it is indefinite for several years in view of the promise for annual return air ticket. There is no mention of pertinent terms and conditions of service. The emphasis is on the work namely Content Moderation and then the payments. The letter dated 06.04.2022 confirms extension of contract from 06.04.2022 ending 05.04.2023 as a Content Moderator with Samasource Delivery Center. Fasica Berhane Gebrekidan accepted the extension of her employment under the terms and conditions outlined in her previous contract. She signed on 06.04.2022. Caroline Wanjiru Mwangi signed as Senior Director – People Operations, Samasource EPZ Kenya Ltd. The Court returns that looking at the letter, the 3rd respondent was acting as an agent of the owner of the work of Content Moderation, the 1st and 2nd respondents. There is nothing in the arrangements to absolve the 1st and the 2nd respondents as the primary and principal employers of

the Content Moderators.

31. While making that finding, the Court has reflected upon the relationship between the 1st and 2nd respondent on the one hand and the 3rd or 4th respondent on the other. Little, no or scanty evidence has been provided by the respondents to explain their relationships. The Court is left to take into account the disclosed relational conduct. And it appears to the Court that the 1st and 2nd respondents are the owners of the digital work known as content moderation. That work is undertaken by the applicants in a digital workspace provided by the 1st and 2nd respondents. The operational requirements and policies in undertaking that digital work in the digital space is determined and imposed upon the applicants by the 1st and 2nd respondents. The 1st and 2nd respondents use digital tools to supervise the performance of the work by the applicants. Based on digital performance measurements, the 1st and 2nd respondents compute, determine and provide the due pay for each of the content moderators, such as the applicants. The role of the 3rd respondent or the 4th respondent as appears to have been identified to replace the

3rd respondent) then was, to recruit the content moderators, train and induct them in the job, provide a physical workplace and associated facilities (for the interface to the digital or virtual workplace and workspace), and, to generally perform the work of a human resource manager especially the classical roles of personnel management. There is nothing on record to suggest or show that the 3rd or 4th respondents work for themselves as consultants hired by the 1st and 2nd respondents to provide workforce as it would happen in a typical outsourcing contract. Even if such outsourcing arrangements existed, they appear to be limited to provision of human resource management services and physical workspace leaving the provision of the digital work of content moderation, the digital workspace or platform for performing the work, the digital operational requirements and, the provision of the money to pay the content moderators in the sole prerogative and obligation of the 1st and 3rd respondents. In absence of the outsourcing contract allocating obligations and roles between the 1st and 2nd respondents on the one hand, and, the 3rd respondent or 4th respondents on the other, the

Court returns that the 1st and 2nd respondents are the principal employers of the applicants, the content moderators, and the 3rd or 4th respondents are the agents of the 1st and 2nd respondents and therefore as well the employers of the applicants for the purposes of the definitions of employment, employee and employer in the Employment Act as well as the decided cases.

32. It was submitted for the 1st and 2nd respondents thus, "3.12. In any case the 1st and 2nd respondents do not engage in recruiting content moderators, as alleged, but rather engage service providers who then engage content moderators. The 1st and 2nd respondents, therefore, play no role in the recruitment of content moderators, and thus any orders issued against the 1st and 2nd respondent would also be an order issued in vain. In addition, it would be illegal for this Court to order that the 1st and 2nd respondents be restrained from engaging other service providers, once it has been shown and established that the 1st and 2nd respondents have no involvement in the redundancy process being implemented." The Court considers that the 1st and 2nd respondent are entitled to outsource the 3rd or 4th

respondents or any other person or corporation to provide the workforce known as content moderators, or, to outsource provision of human resource management of such content moderators, and, to outsource provision of physical workplaces and spaces (that offer the interface with the 1st and 2nd respondent's digital work of content moderation performed in their digital workspace per provided digital infrastructure). However, as the principal employers as owners of the digital work and the digital workspace, the 1st and 2nd respondents must demonstrate how the alleged or purported outsourcing contract distributes obligations between the 1st and 2nd respondents and the 3rd or 4th or such other person or corporation they may wish to outsource. That is more so, in the opinion of the Court, so as to show how the rights and interests of the content moderators undertaking the 1st and 2nd respondents' digital work in the two respondents' digital workspace and per their operational requirements, have been taken care of consistent with Article 41 of the Constitution on fair labour practices. In absence of the details on the outsourcing contract, the 1st and 2nd respondent as principal

employers as found in this case will be liable as shown just for such obligations imposed by law upon employers by the Constitution and the written law. The confusion in the allocation of employer obligations amongst the respondents is apparent when for example the 4th respondent describes its engagement by the 1st and 2nd respondents as "content moderation project". If the literal meaning of a project is a series of tasks that need to be accomplished or completed to reach a specific outcome, or simply inputs and outputs needed to achieve a given goal, then it appears to the court that such is a description that does not help address the concerns of the employment relationship is issue and the applicants then seem to validly lament that the focus of the respondents is to use and dump them with no due recognition, respect, and upholding of their rights to fair labour practices provided for in Article 41 of the Constitution. For its part, it is urged for the 3rd respondent that the fact that the 3rd respondent provided an outsourced service to a contractor of the 1st and 2nd respondent does not mean that the 3rd respondent's employees became the 1st and 2nd respondents' employees. Once

again the Court finds that the alleged contractor of the 1st and 2nd respondents is not disclosed and the terms of the contract and subcontract is not disclosed. Reflecting upon that non-disclosure, the Court returns that in the instant case, upon material on record, the 1st and 2nd respondents are indeed the principal employers of the applicants as already found and the case appears to fall outside the well-known systems of outsourcing in which the owner of the job or work and the outsourced contractor for provision of the workforce clearly share the obligations owed to employees. The Court observes that some of such obligations would be statutory and impose strict liability upon such owner of work and workplace and, also, upon the outsourced contractor as an employer. For example, in **Opige & 4 others v Bollore Africa Logistics (K) Ltd & another (Cause 965 of 2016) [2022] KEELRC 13067 (KLR) (4 November 2022) (Judgment)** the Court held, "**To answer the 1st issue, the court returns that by the agreement for provision and management of outsourced labour exhibited, the 2nd respondent was the sole employer of the claimants. The 2nd respondent by its own**

pleading admits to have employed the claimants. It is true that clause 5(e) provided that to ensure smooth transition from the previous contractor handling the provisions of outsourced labour services, the contractor (the 2nd respondent) was required to absorb all existing outsourced labour under the previous contractor on their current terms of employment and thereafter deal with the said employees in accordance with provisions of the *Employment Act*, 2007 and all applicable legislation regarding the termination of their services. It is submitted for the claimants that the 3rd and 4th claimants' pay slips for period ended July 31, 2014 indicate each was employed on April 14, 2001 – so that pursuant to clause 5(e) the claimants were retained by the 2nd respondent with their accruing rights. While the submission sounds ingenious, the pleadings and the rest of the evidence taken together give a different account. The said 3rd and 4th claimants have pleaded that they were employed in 2002 and 2007 which conspicuously are not anywhere near April 14, 2001 said to be on the pay slips. The court finds that

the allegation that the 1st respondent may have employed the claimants has no supporting evidence. The court has considered the submissions filed for the 1st respondent and finds that as submitted for the 1st respondent, CW in his witness statement admitted that all the claimants were employed by the 2nd respondent. The pleadings were ambiguous on who, of the respondents, was the employer. The court finds that the evidence was that the sole employer of the claimants was the 2nd respondent." In the instant case, there is no material evidence that the owner of the digital work of content moderation and the digital workspace, the 1st and 2nd respondents, shifted liabilities of an owner of work and workspace or employer to the alleged or purportedly contracted and then sub-contracted 3rd respondent or 4th respondent.

33. The Court has reflected upon the lamentations by the applicants that their rights and fundamental freedoms have been violated or are threatened with violation and in particular the right to fair labour practices as provided for in Article 41 of the

Constitution. As submitted for the applicants **Kenya County Government Workers' Union v County Government of Nyeri & another [2015]eKLR** upheld **Peter Wambugu Kariuki & 16 Others –Versus- Kenya Agricultural Research Institute [2013]eKLR** thus, **"What is this right to fair labour practices? First, it is the opinion of the court that the bundle of elements of "fair labour practices" is elaborated in Article 41(2), (3), (4) and (5) of the Constitution. Under Article 41(2) every worker has the right to fair remuneration; to reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike. Under Article 41(3) every employer has the right to form and join an employers' organization; and to participate in the activities and programmes of an employers' organization. Under Article 41(4), every trade union and every employers' organization has the right to determine its own administration, programmes and activities; to organize; and to form and join a federation. Under Article 41(5) every trade union, employers' organization and**

employer has the right to engage in collective bargaining. These constitutional provisions constitute the foundational contents of the right to fair labour practices. Secondly, it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work."

34. In the instant case, the Court has found that there are two manifestations of fair labour practices that are in issue. First is about the obligations of an employer to an employee in a contract of employment. Second, are the obligations of the owner of work and more so an owner of a workplace or workspace. In Kenya's employment law regime, the first one is largely governed by the

Employment Act, 2007 and the 2nd one by the Occupational Safety and Health Act, 2007.

35. The Occupational Safety and Health Act, 2007 is an Act of Parliament to provide for the safety, health and welfare of workers and all persons lawfully present at workplaces, to provide for the establishment of the National Council for Occupational Safety and Health and for connected purposes. Pertinent definitions under the Act include: "**occupier**" means the person or persons in actual occupation of a workplace, whether as the owner or not and includes an employer; "**owner**" means the person for the time being receiving the rents or profits of premises whether on his own account or as agent or trustee of another person, or who would receive the rents and profits if the premises were leased; "**bodily injury**" includes injury to health; "**employee**" means a person who works under a contract of employment and related expressions shall be construed accordingly; "**major incident**" means an occurrence of catastrophic proportions resulting from the use of plant or machinery or from activities at a workplace; "**medical surveillance**" means a planned

programme of periodic examination, which may include clinical examinations, biological monitoring or medical tests of persons employed by a designated health practitioner or by an occupational medical practitioner; "**occupational hygiene**" means the anticipation, recognition, evaluation, monitoring and control of conditions arising in or from the workplace, which may cause illness or adverse health effects to persons. Section 103 provides " (1)Where the Minister is satisfied that— (a) cases of illness have occurred which he has reason to believe may be due to the nature of the process or other conditions of work; (b) by reason of changes in any process or in the substances used in any process or, by reason of the introduction of any new process or new substance for use in a process, there may be risk of injury to the health of a worker engaged in the process; (c) there may be risk of injury to the health of workers from any substance or material brought to the industries to be used or handled therein or from any change in the conditions in the industries, he may make regulations requiring such reasonable arrangements as may be specified in the regulations to be made for

the medical surveillance and medical examination, not including medical treatment of a preventive character, of the persons or any class of persons employed. (2) Regulations made under this section may require the medical surveillance to be carried out by persons registered by the Director, and may prescribe the qualifications and other conditions which are to be satisfied in order to be registered for the purpose of this section. (3)Where the Minister is satisfied that any work involves a risk to the health of employees, he may make rules requiring— (a) medical examination of the employees before they are employed, during their employment, and after the termination of their employment; and (b) regular or individual examinations or surveys of health conditions from the point of view of industrial medicine and industrial hygiene (4) The costs of the examinations referred to in subsection (3) shall be paid by the employer. (5) An employer shall ensure that the examination specified in this section shall take place without loss of earnings for the employees and if possible within normal working hours during their employment. (6) An employee and former employee of the

employer under this section shall be under an obligation to undergo examination in accordance with the regulations. (7) A person who contravenes the provisions of this section or any regulation made there under commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding three months or to both.

36. Further, section 24 of Occupational Safety and Health Act, 2007 provides "24. (1) The Director shall conduct directly or in collaboration with other persons or bodies, research, experiments and demonstrations relating to occupational safety and health, including studies of psychological factors involved, and relating to innovative methods, techniques and approaches of dealing with occupational safety and health problems. (2) The Director shall develop specific plans for such research, demonstration, and experiments as are necessary to produce criteria, including criteria for identifying toxic substances, for the formulation of safety and health standards under this act; and the Director on the basis of such research, demonstration, and experiments, or any other information

available to him, shall develop and publish the criteria necessary for the purposes of this Act. (3) The Director shall develop criteria to deal with toxic material and harmful physical substances and agents which shall describe exposure levels that are safe for various periods of employment, including, but not limited to the exposure level, at which no employee will suffer impaired health, functional capacities or diminished life expectancy as a result of his work experience. (4) The Director shall conduct special research, experiments, and demonstrations relating to occupational safety and health as are necessary to explore new problems including those created by new technology in occupational safety and health, which may require ameliorative action beyond that which is otherwise provided for in this Act and shall also conduct research into the motivational and behavioural factors relating to the field of occupational safety and health. (5) In order to develop needed information regarding potentially toxic substances or harmful physical agents, the Director, may with the approval of the Minister, prescribe regulations requiring employers to measure, record, and make reports on the

exposure of employees to substances or physical agents which may endanger the health or safety of employees and may by such regulations, establish such programmes of medical examinations and tests as may be necessary for determining the incidence of occupational illnesses and the susceptibility of employees to such illness. (6) The Director shall establish a safety and health institute to be known as the Occupational Safety and Health Institute to undertake research into all aspects of safety and health and to conduct safety and health skills training for occupational safety and health officers and other persons."

37. The Court has extensively cited the Act to establish that the 1st and 2nd respondents as owners of the digital work of content moderation and as owners and occupiers of the digital workspace the content moderators work, as well as the employers of such content moderators separately or jointly with their agents or managers or foremen as like the 3rd and 4th respondents, are strictly bound by the provisions of the statutory provisions for the occupational safety and health of the content moderators like the

applicants. While the law may need improvement to specifically provide for the protection of employees undertaking digital work in digital spaces, the Court considers the prevailing law is capable of being implemented to cover the same. The 4th, 5th, 6th, 7th, and 8th interested parties were served but have not entered appearance as to inform the Court about the status of protection of employees' occupational health and safety in the sector of digital work, digital workspaces, and digital workplace and improvement of the applicable policy and law in that regard. The Court consider that pending the hearing of the petition and in view of the lamentations by the content moderators herein, the 4th, 5th, 6th, 7th, and 8th respondents shall review the status of the law and policy for protection of employees' occupational health and safety in the sector of digital work, digital workspaces, and digital workplace and improvement of the applicable policy and law and report to the Court in that regard including extent of protection of the applicants in the instant case.

38. While making that finding the Court has examined the

evidence and returns that the applicants and the 3rd respondent are in agreement that the content of the work of content moderators is inherently hazardous with likely serous and adverse mental health impact as urged and demonstrated by the applicants in the supporting affidavits. There is no doubt that applicants have established that by reason of undertaking the content moderation work, some of them have thereby acquired mental illness like in the exhibited letter by Dr. Kigamwa Consultant Psychiatrist confirming that one of the applicants had acquired insomnia associated with her work. The same fact of the inherent hazard of the work of content moderation was acknowledged by the 3rd respondent who suggested to have provided numerous professional counsellors at the disposal of the applicants. Further in the redundancy process, the 3rd respondent acknowledges the same by providing a one-year post separation support in that regard. It is that in a constitutional petition, once a violation or threat of violation is established, the Court goes into inquiry to provide for appropriate relief and as urged for the applicants in their submissions.

39. The Court has considered and been guided, as is bound, by the Court of Appeal holding in **Commission on Administrative Justice –Versus- Kenya Vision 2030 Delivery Board & 2 others [2019]eKLR** (Nambuye, Kiage & Murgor JJ.A) thus,"**As for an order for compensation and assessment of the attendant quantum of damages, having ruled above in favour of the 3rd respondent in his claim that his right to a Fair Administrative Action was infringed by the 1st respondent, we issue a declaration that the 3rd respondent's right to a Fair Administrative Action was violated by the 1st respondent. Consequent to the above finding, we now proceed to redress the same. The approach we take is as was stated by the High Court in Ericson Kenya Limited versus Attorney General & 3 others [2014] eKLR for the holding inter alia that: "a court of law has a duty after finding in favour of a party under Article 23 of the Kenya Constitution 2010 to frame appropriate reliefs to vindicate the rights that may have been infringed and which reliefs are not limited to the specific (reliefs) outlined in Article**

23(3) (a) to (e)" In Gitobu Imanyara & 2 others –versus- Attorney General [2016] eKLR we observe that the primary purpose of a constitutional remedy is not compensatory or punitive, but it is for purposes of vindicating the rights violated and to prevent or to deter any future infringement. See also Lucas Omoto Wamari & 2 others [2017] eKLR for observations inter alia that: ".... mere declaration without any specific award of damages do not vindicate the appellant. Neither do they convey a derogative message regarding the sanctity of the constitution and the need for protection of fundamental rights and freedoms...."

40. In **Kenya Agricultural Research Institute versus Peter Wambugu Kariuki & others Nakuru Civil Appeal No. 315 of 2015**, the following observations were made by the Court of Appeal: **"Our construction of Article 23 of the Constitution of Kenya, 2010 is that, it simply makes provisions that where a violation of the guaranteed constitutional rights and fundamental freedom has been established, the court has a wide range of remedies to**

grant. Among these is payment of monetary compensation. In the instant appeal as already mentioned above, the Judge simply made a pronouncement that the cross-appellant's rights and fundamental freedom had been violated but made no provisions for an appropriate remedy in line with that finding." We find nothing in the said Article to suggest that a particular relief for the alleged violation must be prayed for before it may be granted. We therefore find that there was jurisdiction for the Judge to grant the reliefs notwithstanding, lack of specific prayer for the particular appropriate remedy. In light of the above, it is our finding that the 3rd respondent is entitled to an award of damages which we now proceed to assess. The comparables for an appropriate award of damages for the established breach are as were set out in Lucas Omoto Wamari –versus- Attorney General & Another (supra) wherein, the Court reviewed the awards granted in Jennifer Muthoni Njoroge and others –versus- the Attorney General [2012] eKLR, and Benedict Munene Kariuki & 13 others –versus- the

Attorney General; High Court Petition No. 722 of 2009, wherein, claimants were variously awarded amounts of between Kshs. 1.5. Million and Kshs. 2 million for torture, cruel and inhuman treatment and unlawful detention for periods ranging between seven (7) days to fourteen (14) days."

41. The Court considers that the Court of Appeal in the cited cases applies in final remedies as in interim and even in ad-interim reliefs for protection of constitutional rights and fundamental freedoms. It cannot be that for want of elaborate provisions and regulations under the Occupational Safety and Health Act, 2007 the applicants are left without appropriate remedy. Thus, in that consideration, an order will issue that pending the hearing of the petition and in view of the lamentations by the content moderators herein, the 4th, 5th, 6th, 7th, and 8th interested parties shall review the status of the law and policy for protection of employees' occupational health and safety in the sector of digital work, digital workspaces, and digital workplace and improvement of the applicable policy and law and report to the Court in that regard including extent of protection of the applicants

in the instant case.

42. The Court has deeply reflected upon the sector of virtual or digital work, digital workplace and digital workspaces and the need to address the involved employees' occupational safety and health. Such are the serious matters raised in the instant case besides the associated concerns about the ensuing complex employment relationships in which same actors appear to remain anonymous like the alleged contractor the 3rd respondent alleged was contracted by the 1st and 2nd respondents and who allegedly subcontracted the 3rd respondent. The Court has noted that the Kenya institute for Public Policy Research and Analysis (KIPPRA) has published "**An Overview of Workplace Safety and Health in Kenya**" By Grace Mukami Muriithi, Young Professional, Capacity Building Department at https://kippra.or.ke/an-overview-of-workplace-safety-and-health-in-kenya/ . The publication may not have specifically covered the gaps about virtual or digital work, digital workplace, digital workspaces and, employment rights and obligations in the metaverse. However, the publication identified the

emerging gaps thus, "In regard to application of OSH with the new working from home measures, OSHA refers to workplace as any premise, location, land, vessel or thing, at, in, upon, or near which, a worker is, in the course of employment. As such, working remotely from home or own premises is also considered as a workplace but the responsibility of exercising due care of the 'workspace' is mainly transferred to the workers. OSHA does not comprehensively cover a situation where working from home is the daily routine and, therefore, the Act does not offer further guidelines in regard to health and safety of employees while they work from home. Nonetheless, this should not deter workers from reporting work-related accidents and diseases associated with working from home as investigations can be conducted to establish such claims through DOSHS. Employers should initiate a reporting system for any work-related accidents, injuries and illnesses that may occur while working from home. In addition, employers are also encouraged to create awareness and sensitization and provide workers with resources for setting up an ergonomic workstation at

home, such as sensitizing workers on better housekeeping practices such as position of electronic cords, how to clear clutter and proper storage of heavy and sharp items and provision of resources such as laptops, internet connectivity and orthopedic chairs. Therefore, there is need to review the OSH Act to accommodate the evolution and changing dynamics of workplaces such as working from home and digital labour platforms." In view of the emergent issues in a wholly new sector of digital work and digital workspaces and to assist the Court and the parties, pending the hearing and determination of the petition, the 4th, 5th, 6th, 7th, and 8th interested parties shall review the status of the employment policy and law and steps being taken to sufficiently provide for the rights and obligations of employers and employees with respect to the sector of virtual or digital work, digital workplace and digital workspaces.

43. Within that province of law reform and the related interim orders that will issue, the Court has reflected upon the applicants' uncontroverted concern that they could not access regular medical assessments or attention despite the work of content moderators

being hazardous. The evidence is that only counsellors appear to have been available and whether they were adequate for the purpose is in dispute. The Factories and Other Places of Work (Medical Examination) Rules, 2005 are a subsidiary legislation to the Occupational Safety and Health Act.The Rules apply to medical examination of all those employees in employment or have been in employment in every workplace, to which the provisions of the Act apply. Rule 2 states "**medical examination**" means examination of workers exposed to specified occupational hazards indicated in the First Schedule to the Rules for the purpose of prevention and control of occupational diseases. The First Schedule does not essentially cover or envisage the sector of virtual or digital work, digital workplace and digital workspaces for purposes of control of occupational diseases. However, the Rules defined the relevant medical practitioners to undertake the medical examinations thus, "**designated health practitioner**" means any medical practitioner whether a public officer or not who is authorized by the director, by certificate in writing, to carry out examination of workers in

accordance with, and for the purposes of the Rules. It appears to the Court that such are the medical practitioners that would undertake the medical surveillance under the Act and therefore including the sector of virtual or digital work, digital workplace and digital workspaces including work in the metaverse and for purposes of control of occupational diseases. It is at this interim stage established for the applicants that the work of content moderation exposed them to hazardous work potentially predisposing them to mental ill-health or diseases and related adverse psychological impacts. The 4th schedule to the Rules provides for tabulated particulars on the work involving risk to health; the medical examination; examination interval; and, indication for redeployment and notification to the Director of Occupational Safety and Health. It is the Court's view that the relevant similar or better parameters and particulars would have to be innovatively developed with respect to the sector of virtual or digital work, digital workplace and digital workspaces including work in the metaverse and for purposes of control of occupational diseases.

44. The **4th issue** for determination is whether the applicants have met the threshold for grant of the interim orders as prayed for.

45. The parties are in agreement that the applicable principles are as set out in **Giella –Versus- Cassman Brown (1973) EA, 358** being:

a) The applicant had established a prima facie case with a probability of success.

b) The applicant stood to suffer irreparable loss which would not be adequately compensated by an award of damages; and

c) If the court was in doubt, the application would be determined on a balance of convenience.

46. In **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** Court of appeal held that the tests are to be applied sequentially ensuring the applicant satisfies them. In that case, the Court of Appeal (Ouko, Kiage and M'Inoti JJ. A) held thus, "**In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**

(a) establish his case only at a *prima facie* level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may

appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit *"leap-frogging"* by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

On the second factor, that the applicant must establish that he *"might otherwise"* suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima face*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the

applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot *"adequately"* be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

"Prima facie" is a Latin phrase for *"at first sight"*, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like *"a serious question to be tried"*, *"a question which is not vexatious or frivolous"*, *"an arguable case"* have been adopted to describe the burden imposed on the applicant to demonstrate the existence of *prima facie* case. The leading English House of Lords case of the American Cyanamid Co. Ethicon Ltd [1975] AC 396 is a case in point. The meaning of *"prima facie case"*, in our view,

should not be too much stretched to land in the loss of real purpose. The standard of *prima facie* case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in Ramanlal Trambaklal Hatt V. Republic [1957] E.A. 332.

Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for *"prima facie case"* in civil cases in the following words:

"In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

47. The Court of Appeal further stated, "**We adopt that definition**

save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a

preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

48. As submitted for the 1st and 2nd respondents, the further guiding principles guiding the Court in such applications is as was held in **Geoffrey Mworia –Versus- Water Resources Management Authority and 2 Others [2015]eKLR** thus, **"The principles are clear. The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes**

it impossible to deal with the breach through the employer's internal process."

49. The Court is guided by those principles accordingly and will proceed to apply them to test the prayers made for the applicants.

50. The petitioners (applicants) prayed for orders as follows:

a) That pending the hearing and determination of the petition, the Honourable Court be pleased to issue an interim injunction order restraining the 1st, 2nd and 3rd respondents from implementing in any manner whatsoever anything incidental to or related to the redundancy notice issued to Facebook Content Moderators (GPL 8 CO) on 10.01.2023 as read together with the redundancy notice issued on 18.01.2023; in particular, and for greater certainty, the 1st, 2nd and 3rd respondents be restrained from terminating the contracts of the Facebook Content Moderators pending the hearing of the petition. The Court has considered the material on record. The Court returns that as submitted for the applicants, they have established a *prima facie* case. The Court has found that the

applicants' principal employers are the 1st and 2nd respondents with the 3rd or 4th respondents or persons undertaking similar roles of the 3rd or 4th respondents in the relationship being the secondary employers by reason of being agents, managers, foremen or factors of the 1st and 2nd respondents within the definition of employer, employee and employment under the Employment Act. The evidence is that the work of content moderation is still available as provided by the 1st and 2nd respondents. The 3rd respondent has not disclosed its relationship with the 1st and 2nd respondents beyond that of agency as shown by the exhibits that the respondents are indeed "partners". If indeed the 3rd respondent has made a decision to pull out of content moderation business as alleged (but which the applicants have disputed), the job of content moderation performed by the applicants as provided for by the 1st and 2nd respondents would remain available. It is submitted for the respondents that the Court should not impose or rewrite the parties' contract of service. The Court agrees to that

position. What is that contract? Upon material on record it is scarcely written and largely unwritten. As for the redundancy, the Court has found that the jobs as provided by the 1st and 2nd respondents are still available. Redundancy under section 2 of Employment Act is defined thus, "**redundancy**" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment. The Court finds that in relation to the responds as employers of the applicants, jointly or severally - and more so of the 1st and 2nd respondents, it cannot be said the work done by applicants as content moderators has become superfluous or abolished. As far as the 3rd respondent is concerned and as submitted for the applicants, in any event, the 3rd respondent's purported reason for redundancy is inconsistent – namely whether the 3rd respondent was shifting

away from the content moderation business or that the 1st and 2nd respondents had withheld the content moderation business from the 3rd respondent. The upshot is that there is no established valid or genuine reason per section 43 of the Employment Act and that is fair per section 45 of the Act to justify the redundancy. The Court finds that *prima facie*, the reason advanced for the purported redundancy has not been shown by the 1st, 2nd and 3rd respondents as existing or as valid, genuine and unfair as required in sections 43, 45, and 47(5) of the Act. Is it that by granting the interim order, the Court is imposing renewal of the term contracts that may have lapsed or are due to lapse? The Court answers in the negative, that it would not be re-writing or imposing the contracts. It has been emphasized by the 3rd respondent that the applicants were subjected to a pre-engagement training upon whose basis they were to take up the employment or reject the same. The 3rd respondent has exhibited on the replying affidavit the power point presentation relied upon to train the applicants marked

exhibit AA1 and titled, "PEOPLE TEAM INDUCTION; At Samasource we have an open door culture where we encourage employee participation; WE GIVE WORK". The presentation slide on employee contracts and salary states as follows:

Employment effective date, probation terms, acknowledgement of policies, exit terms, confidentiality.

Salary is paid once a month by the last day of the month via Mpesa & EFT

- Must be mainstream bank –cannot be a Sacco or microfinance bank.
- Account must be in employee's name.
- Payslips are uploaded to ESS portal.

Initial contract is for 1-year subject to renewal.

Renewal is subject to performance and exigencies of the business.

The Court returns that there is nothing on record to show that the clause on renewal had been invoked and there is nothing to suggest that the

applicants' performance was wanting. Granting the interim order would therefore be consistent with the terms and conditions of engagement because the purported redundancy appears to proceed unlawfully as found and in absence of any other material on record, the applicants are entitled to the renewal. The Court has earlier in this judgment found that there is nothing on record to absolve the 1st and 2nd respondents as the primary and principal employers of the Content Moderators. The Contract given to the Content Moderators was silent on tenure and by promising an annual return ticket, it implied an indefinite tenure with annual breaks. That is the parties' own agreed arrangement and by granting an interim order to protect the same the Court would not be rewriting or imposing anything or a contract of service upon the parties. Thus as found and as submitted for the applicants, a *prima facie* case has been established in that regard.

On irreparable injury, the applicants have established and the 3rd respondent has acknowledged that the applicants have been exposed to the inherently hazardous work of content moderation. On a balance of probability, the order when granted will afford the parties to better address

the issue of the applicants' occupational diseases and appropriate remedial measures. If separation is allowed to proceed, the parties will separate and the applicants will go their ways some to home countries with doubtful environment for their health care as proposed for by the 3rd respondent – amounting to what the applicants call being used by the respondents and dumped in circumstances of potential permanent mental ailment. Such is a serious irreparable injury in the findings of the Court. It also appears to the Court that many of the applicants are foreigners and if they leave the jurisdiction consequential to the separation, they will never be able to effectively prosecute the instant case. All the respondents' concerns are that they will or are making losses. However, the Court has found that the job of content moderation is available, the applicants will continue working upon the prevailing or better or terms of the interim orders. It will be a proper balance of benefits as already negotiated between the parties. In any event, as was held by Odeny J in **Banis Africa Ventures Limited v National Land Commission [2021] eKLR** consideration of availability of damages wanes where the action complained of is unlawful thus, "**In the case of Said Almed vs. Mannasseh Benga & Another [2019]**

eKLR the court held that: "Where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of Aikman vs Muchoki (1984) KLR 353.' See the case of Joseph Mbugua Gichanga vs Co-operative of Kenya Ltd (2005)eKLR."

The Court finds that in the instant case and as submitted for the applicants, there is no doubt on the tests of *prima facie* case and irreparable injury. Consideration of balance of convenience would be superfluous but it is also found that the balance of convenience tilts in favour of the applicants by reason of the findings on prima facie case and irreparable injury.

The finding is that prayer will issue.

b) The applicants pray that pending the hearing and determination of the petition, the Honourable Court be pleased to issue an interim injunction order restraining the 1st, 2nd, and

3rd respondents from varying the contractual terms of the Facebook Content Moderators (GPL 8 CO) in a manner unfavourable to the moderators. The Court has already found that the 1st, 2nd and 3rd respondents are jointly employers of the applicants with the 3rd respondent being an agent of the 1st and 2nd respondent. For matters as already found in this ruling, the order will issue. The Court has found that the 1st, 2nd and 3rd respondents have not disclosed the terms of their relationship and how the interests and rights of the applicants are provided for. The order will therefore issue considering that until the 1st, 2nd and 3rd respondents disclose their arrangements and apportionment of obligations to their employees, the Content moderators, it is established that separation as on-going is prejudicial to the applicants as it is unlawful.

c) The applicants prayed that pending the hearing and determination of the petition, the Honourable Court be pleased to issue an interim order that any contracts that were to lapse before the determination of the petition be extended such that

the termination date will be after the determination of the petition. The Court has already found the prayer as valid and fair in the interim.

d) The petitioners prayed that pending the hearing and determination of the petition, the Honourable Court be pleased to issue an interim injunction order restraining the 1st and 2nd respondents from engaging content moderators to serve the Eastern and Southern African region through the 4th respondent or through any other agent, partner or representative or in any manner whatsoever engaging moderators to do the work currently being done by the moderators engaged through the 3rd respondent. The Court has found that the 1st and 2nd respondents are the owners of the work known as content moderation performed by the applicants. The 1st and 2nd respondents would not be barred from engaging the 4th respondent except that the applicants being content moderators continue in employment. The order will issue with the modification thus, pending the hearing and

determination of the petition, the Honourable Court be pleased to issue an interim injunction order restraining the 1st and 2nd respondents from engaging content moderators to serve the Eastern and Southern African region through the 4th respondent or through any other agent, partner or representative or in any manner whatsoever engaging moderators to do the work currently being done by the moderators engaged through the 3rd respondent, and unless, the content moderators are otherwise retained in employment upon the prevailing terms as the respondents may arrange.

e) The applicants prayed that pending the hearing and determination of the petition, the Honourable Court be pleased to issue a prohibitory order restraining the 1st, 2nd and 4th respondents from refusing to recruit qualified content moderators on grounds that they were previously engaged through the 3rd respondent. The 4th respondent appears to urge that it does not support discrimination or unfair treatment. The prayer appears not contested as such and in any event Articles

27 and 41 of the Constitution as well as section 5 of the Employment Act require employers to uphold fair treatment and freedom from discrimination with respect to their employment policies. The order will issue as in any event its terms are a declaration of the law.

f) They prayed that pending the hearing and determination of the petition, the Honourable Court be pleased to issue a prohibitory order restraining the respondents either by themselves, their servants, agents, employees, or anyone acting under their authority, direction, control, or instruction from, whether by words or actions, making any threat to or in any way whatsoever retaliating against any moderators as a result of the institution of the petition. The Court finds that the prayer is consistent with protections under section 46 (h) of the Employment Act which provides that it is an unfair reason to dismiss or punish an employee on account of employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint

is shown to be irresponsible and without foundation. The petition is a genuine pursuit of justice and the order will issue as prayed for.

g) The applicants prayed that pending the hearing and determination of the petition, the Honourable Court be pleased to issue an order to compel the 1st, 2nd and 3rd respondents to provide proper medical, psychiatric and psychological care for the petitioners and other Facebook Content Moderators in place of 'wellness counselling'. The Court has found that there is established need to attend and to undertake medical surveillance as envisaged in the Occupational Safety and Health Act and by the appropriate designated health practitioners. The material on record show that the work of content moderators is inherently hazardous. The Order will therefore issue as prayed for.

h) The applicants prayed that pending the hearing and determination of the petition, the Honourable Court be pleased to issue an order to the 1st, 2nd, and 3rd respondents to regularize

the immigration status for all Facebook Content Moderators who are immigrants and all costs protect them from deportation. The Court returns that the prayer is consistent with the other orders which have been found justified. The order will issue as

i) As the applicants have succeeded in their application, the 1st, 2nd and 3rd respondents will jointly or severally pay the costs of the application.

51. The **5th issue** is whether the petition was trapped by the rule of *sub judice*. It was urged for the 3rd respondent that the current petition was *sub judice* the earlier proceedings in ELRC Constitutional Petition No. E071 of 2022 **Daniel Motaung Vs Samasource EPZ ltd T/A Sama & Others** and are for dismissal and striking out respectively. As urged for the applicants, the cause of action in the instant petition appear to accrue long after the one in the earlier petition. The Court returns that the present dispute cannot be said to be in issue in the earlier petition. It is that even if the earlier petition is decided one way or the other, the present suit would have

to proceed to full hearing and determination.

52. The Court has considered the dispute including the related emergent issues of policy and law reform in the emergent sector of virtual or digital work, digital workplace and digital workspaces including work in the metaverse and for purposes of control of occupational diseases and defining the rights and obligations of the employees and employers. The Court considers that pending the hearing and determination of the petition, the parties to consider alternative dispute resolution including negotiation, conciliation or mediation with a view of arriving at amicable compromise and recording a consent in court as may be just or appropriate.

In conclusion, the application dated 17.03.2023 and filed for the petitioners (applicants) herein is hereby determined with orders:

1) That pending the hearing and determination of the petition, an interim injunction order is hereby issued restraining the 1st, 2nd and 3rd respondents from implementing in any manner whatsoever anything incidental to or related to the redundancy notice issued to Facebook Content Moderators (GPL 8 CO) on

10.01.2023 as read together with the redundancy notice issued on 18.01.2023; in particular, and for greater certainty, the 1st, 2nd and 3rd respondents are hereby restrained from terminating the contracts of the Facebook Content Moderators pending the hearing of the petition.

2) That pending the hearing and determination of the petition, an interim injunction order is hereby issued restraining the 1st, 2nd, and 3rd respondents from varying the contractual terms of the Facebook Content Moderators (GPL 8 CO) in a manner unfavourable to the moderators.

3) That pending the hearing and determination of the petition, an interim order is hereby issued that any contracts that were to lapse before the determination of the petition be extended such that the termination date will be after the determination of the petition.

4) That pending the hearing and determination of the petition, an interim injunction order is hereby issued restraining the 1st and 2nd respondents from engaging content moderators to serve the Eastern and Southern African region through the 4th respondent

or through any other agent, partner or representative or in any manner whatsoever engaging moderators to do the work currently being done by the moderators engaged through the 3rd respondent, and unless, the content moderators herein are otherwise retained in employment upon the prevailing or better terms and conditions of service as the respondents may jointly or severally arrange.

5) That pending the hearing and determination of the petition, a prohibitory order is hereby issued restraining the 1st, 2nd and 4th respondents from refusing to recruit qualified content moderators on grounds that they were previously engaged through the 3rd respondent.

6) That pending the hearing and determination of the petition, a prohibitory order is hereby issued restraining the respondents either by themselves, their servants, agents, employees, or anyone acting under their authority, direction, control, or instruction from, whether by words or actions, making any threat to or in any way whatsoever retaliating against any moderators as

a result of the institution of the petition.

7) That pending the hearing and determination of the petition, an order is hereby issued compelling the 1st, 2nd and 3rd respondents to provide proper medical, psychiatric and psychological care for the petitioners and other Facebook Content Moderators in place of 'wellness counselling'.

8) That pending the hearing and determination of the petition, an order is hereby issues for the 1st, 2nd, and 3rd respondents to regularize the immigration status for all Facebook Content Moderators herein who are immigrants and at all costs protect them from deportation.

9) That pending the hearing of the petition and in view of the lamentations by the content moderators herein, the 4th, 5th, 6th, 7th, and 8th interested parties shall review the status of the law and policy for protection of employees' occupational safety and health in the sector of virtual or digital work, digital workspaces, and digital workplace and measures for improvement of the applicable policy and law and report to the Court in that regard

including extent of protection of the applicants in the instant case.

10) That pending the hearing and determination of the petition, the 4th, 5th, 6th, 7th, and 8th interested parties shall review the status of the employment policy and law and steps being taken to sufficiently provide for the rights and obligations of employers and employees with respect to the sector of virtual or digital work, digital workplace and digital workspaces.

11) That pending the hearing and determination of the petition, the parties are encouraged to consider alternative dispute resolution including negotiation, conciliation or mediation with a view of arriving at amicable compromise and recording a consent in court as may be just or appropriate.

12) That the 1st, 2nd and 3rd respondents will jointly or severally pay the costs of the application.

13) As the file was before this Court while Nduma J handling the file was on leave and case having been certified urgent and, Nduma J will shortly resume from leave, parties to agree on a convenient date for mention before Nduma J for further steps in

the matter.

Signed, dated and delivered by video-link and in court at Nairobi this Friday 2nd June, 2023.

BYRAM ONGAYA
PRINCIPAL JUDGE